Before the
Federal Communications Commission
Washington, D.C. 20554

Communications Vending Corporation of Arizona, Inc., *et al.*,	)	
Complainants,	)	
v.	)	File Nos. EB-02-MD-018 – 030
Citizens Communications Company f/k/a Citizens Utilities Company and Citizens Telecommunications Company d/b/a Citizens Telecom, *et al.*,	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 2002 **Released: November 19, 2002**

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we partially grant 13 formal complaints[1] filed by independent payphone providers ("IPPs") against local exchange carriers ("LECs"), asserting that Defendants violated Sections 201(b) and 203(c) of the Communications Act of 1934, as amended, [2] and Part 69 of the Commission's rules, [3] by improperly assessing end user common line ("EUCL") charges on the Complainants' payphones. These complaints were brought by Communications Vending Corporation of Arizona, Inc ("CVCA"), IMR Capital Corporation ("IMR"), Indiana Telcom Corporation, Inc. ("ITC"), National Telecoin Corporation, Inc. ("NTC"), NSC Communications Public Services Corporation ("NSC"), and Payphone Systems (collectively

[1] *See* Appendix A for a list of the complaints at issue in this proceeding. Due to procedural deficiencies, the Commission rejected the formal complaints initially filed by Complainants on April 17, 2002. *See* Letter from Tracy E. Bridgham, Special Counsel, Market Disputes Resolution Division, Enforcement Bureau, to Albert H. Kramer and Katherine J. Henry, counsel for Complainants (rel. Apr. 23, 2002) ("April 23, 2002 Letter Ruling") at 2. The Commission consolidated the refiled complaints for administrative convenience. *See* Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, to all counsel, File Nos. EB-02-MD-018 – 030 (rel. May 1, 2002) ("May 1, 2002 Letter Ruling") at 5.

[2] 47 U.S.C. §§ 201(b) and 203(c). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. (1996) (the "Act").

[3] 47 C.F.R. §§ 69.1 *et seq.* (1987 – 1997). Unless otherwise indicated, all C.F.R. references to Part 69 of the Commission's rules refer to the rules in effect prior to April 15, 1997.

"Complainants") against Citizens,[4] Qwest,[5] Verizon,[6] ALLTEL,[7] SBC,[8] BellSouth,[9] Century,[10] and TDS[11] (collectively "Defendants").[12]

2. We note that approximately 3000 informal complaints pending with the Commission raise virtually identical issues to those we rule on today.[13] Many of the parties in these thirteen cases are also involved in the pending informal complaints. Given the similarity in the issues and the parties, we believe the rulings contained in this order will facilitate informal resolution among the parties of the pending informal complaints. Finally, we note that, because the Commission amended its access charge rules on April 15, 1997, the issues addressed in this order will only have retrospective application.[14]

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[4] "Citizens" refers collectively to Citizens Communications Company f/k/a Citizens Utilities Company, Citizens Telecommunications Company d/b/a Citizens Telcom, and Citizens Telecommunications Company of California, Inc. f/k/a Citizens Utilities Company of California, Inc.

[5] "Qwest" refers collectively to Qwest Corporation f/k/a US West Communications, Inc., a Successor-in-Interest to Mountain Bell Telephone Company.

[6] "Verizon" refers collectively to Verizon New England Inc. f/k/a New England Telephone Company, Verizon North Inc. f/k/a GTE North, Incorporated, a Successor-in-Interest to Contel of Indiana, Inc., Verizon Delaware Inc. f/k/a Bell Atlantic-Delaware, Inc., Verizon New Jersey, Inc. f/k/a Bell Atlantic-New Jersey, Inc., and Verizon Pennsylvania, Inc. f/k/a Bell Atlantic-Pennsylvania, Inc.

[7] "ALLTEL" refers collectively to ALLTEL Corporation, Western Reserve Telephone Company-ALLTEL, ALLTEL Ohio, Inc. and ALLTEL Indiana, Inc.

[8] "SBC" refers collectively to Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana and Ohio Bell Telephone Company, Inc. d/b/a Ameritech Ohio ("Ameritech") and Pacific Bell Telephone Company ("PacBell"). SBC Telecommunications, Inc. is the parent company of Ameritech and PacBell.

[9] "BellSouth" refers collectively to BellSouth Telecommunications, Inc. f/k/a South Central Bell Telephone Company.

[10] "Century" refers collectively to CenturyTel, Inc. and Century Telephone of Central Indiana, Inc. f/k/a Central Indiana Telephone Company.

[11] "TDS" refers collectively to Telephone and Data Systems, Inc., TDS Telecommunications Corporation, Tipton Telephone Company, Inc. d/b/a TDS Telcom, Communications Corporation of Indiana d/b/a TDS Telcom, and Home Telephone Company of Pittsboro, Inc.

[12] Citizens, ALLTEL, Century, and TDS maintain that certain affiliated entities named in the complaints against them are not proper parties to this proceeding because the entity in question did not provide local exchange services to the particular Complainant. Defendants, however, concede that each of the complaints at issue has named the entities that did actually provide service to the Complainants. *See* Supplemental Consolidated Joint Statement Concerning Issues 1 and 4 Identified in the Commission's August 7, 2002 Letter Ruling (filed Aug. 15, 2002) ("First Supplemental Joint Statement") at 4, ¶¶ 10-11; 7, ¶¶ 20, 26-28; 12-13, ¶¶ 42, 48-49; 14-15, ¶¶ 51-52, 58. Because this issue bears on the entities from whom Complainants may recover damages, we will defer its resolution to the next phase of this proceeding.

[13] *See* FCC Open and Pending List of EUCL Informal Complaints, dated June 29, 2001 ("June 29, 2001 FCC Open and Pending List of EUCL Informal Complaints").

[14] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 20541, ¶ 187 (1996), vacated in part on other grounds, *Illinois Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693 (D.C. Cir. 1997); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order on Reconsideration, 11 FCC Rcd 21233, ¶ 207 (1996).

II. BACKGROUND AND SUMMARY

3. As noted above, the Complainants in these cases are independent payphone providers, and the Defendants are local exchange carriers, to whose telephone lines Complainants' payphones were connected.[15] The complaints concern EUCL charges that the Defendants imposed on Complainants' pay telephones from 1986 through April 15, 1997.[16]

A. The History of the EUCL Dispute

4. The issue of EUCL charges for payphones first arose several years ago, after the Commission first adopted access charge rules that required LECs to impose EUCL charges. A review of the history of this issue will help to put the current disputes into context.

5. When the Commission first adopted access charge rules in 1982, it permitted LECs to recover certain non-traffic sensitive costs from end users through the monthly, flat-rated EUCL charge.[17] Because the end users of public payphones,[18] however, consist of the "transient general

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[15] *See e.g.* CVCA v. Citizens Complaint at I-4, ¶ 1. We note that this information appears on the same page in all the complaints at issue. *See also* Consolidated Answer of Citizens Defendants to Formal Complaints and Supplements to Formal Complaints, File Nos. EB-02-MD-018 and EB-02-MD-029 (filed June 28, 2002) ("Citizens Consolidated Answer") at 2, ¶ B3; Qwest Corporation's Answer to CVCA's Formal Complaint, File No. EB-02-MD-019 (filed June 28, 2002) ("Qwest Answer") at I-9, ¶ 3; Answer of Verizon New England Inc. to IMR Capital Corporation's Complaint, File No. EB-02-MD-020 (filed June 28, 2002) ("Verizon New England Answer") at A-6, ¶ 3; Revised Answer of ALLTEL Corporation, Western Reserve Telephone Company, ALLTEL Ohio, Inc., and ALLTEL Indiana, Inc., File No. EB-02-MD-021 (filed July 15, 2002) ("ALLTEL Supplemental Answer") at I-5, ¶¶ 6; 8; Consolidated Answer of Indiana Bell Company, Ohio Bell Telephone Company, and Pacific Bell Telephone Company, File Nos. EB-02-MD-022 and EB-02-MD-028; EB-02-MD-030; (filed June 28, 2002) ("SBC Answer") at 5-6, ¶¶ 1, 3; 6-7, ¶¶ 1, 3; 7-8, ¶¶ 1, 3; Answer of BellSouth Telecommunications, Inc., File No. EB-02-MD-023 (filed June 28, 2002) ("BellSouth Answer") at I-4, ¶¶ B1, B3; Revised Answer of CenturyTel, Inc. and CenturyTel of Central Indiana, Inc., File No. EB-02-MD-024 (filed July 15, 2002) ("Century Supplemental Answer") at I-5, ¶¶ 6, 8; Defendants Telephone and Data Systems, Inc., TDS Telecommunications Corporation, Tipton Telephone Company, Inc., Communications Corporation of Indiana and Home Telephone Company of Pittsboro, Inc.'s Answer to Complaint, File No. EB-02-MD-025 (filed June 28, 2002) ("TDS Answer") at 3, ¶¶ B1, B3; Answer of Verizon North Inc. to Indiana Telcom Corporation's Complaint, File No. EB-02-MD-026 (filed June 28, 2002) ("Verizon North Answer") at A-7, ¶ 3; Answer of Verizon Delaware Inc., Verizon New Jersey Inc. and Verizon Pennsylvania Inc. to National Telecoin Corporation's Complaint, File No. EB-02-MD-027 (filed June 28, 2002) ("Verizon Delaware et al. Answer") at A-6, ¶ 3; First Supplemental Joint Statement at 4, ¶¶ 10-11; 5, ¶ 12; 6, ¶ 18; 16, ¶¶ 59, 61.

[16] Complainants filed informal complaints regarding the controversy at issue in the above-referenced formal complaints during 1997 and 1998. Subsequent waiver orders extended the time for converting the informal complaints to formal complaints until June 30, 2003. Therefore, provided the informal complaints were properly filed, the formal complaints at issue here were timely filed. *See* 47 U.S.C. § 415(b). *See also Informal Complaints Filed By Independent Payphone Service Providers Against Various Local Exchange Carriers Seeking Refunds of End User Common Line Charges*, Order (EB DA 02-1890) (rel. Aug. 2, 2002), at ¶ 2 ("*Third Waiver Order*"); *Informal Complaints Filed By Independent Payphone Service Providers Against Various Local Exchange Carriers Seeking Refunds of End User Common Line Charges*, Order, 17 FCC Rcd 2115, 2116, at ¶ 3 (EB 2002) ("*Second Waiver Order*"); *Informal Complaints Filed By Independent Payphone Service Providers Against Various Local Exchange Carriers Seeking Refunds of End User Common Line Charges*, Order, 16 FCC Rcd 3669, 3671, at ¶ 5 (CCB 1999) ("*First Waiver Order*").

[17] *See MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 243, ¶ 3; 280, ¶ 128 (1983) ("*Access Charge* Order"), modified on recon., 97 FCC 2d 682 (1983) ("*First Reconsideration Order"*) modified on further recon., 97 FCC 2d 834 (1984), aff'd and remanded in part sub nom., *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). *See also C.F. Communications Corp. v. FCC*, 128 F.3d 735, 736-7 (D.C. Cir. 1997) (*"C.F. Communications"*).

public," rather than identifiable subscribers,[19] the Commission in 1983 exempted public payphones from the EUCL charge.[20] The Commission determined that the EUCL charge should be imposed on semi-public payphones,[21] however, because subscribers to that service constitute identifiable business end users.[22]

6. At the time the access charge scheme was developed, the only entities authorized to provide payphone service were LECs.[23] IPPs were later permitted to enter the market in 1984, essentially interposing a 'middle man,' as it were, between the LECs and the ultimate payphone users.[24] The controversy here was created because the access charge rules were not modified in 1984 to specify the manner of imposing EUCL charges on IPP payphones.

7. With the advent of IPP payphones in 1984, Defendants, on their own accord, determined that IPPs were end users and assessed the EUCL charge on all IPP payphones, irrespective of whether they were public or semi-public.[25] Defendants, however, did not assess the EUCL on their own public payphones.[26] The IPPs disputed these charges, and two IPPs lodged informal complaints (in 1988 and 1989).[27] In response to both, Commission staff interpreted the Commission's rules and found that the LECs' assessment on the IPPs was permissible.[28] Subsequently, on April 21, 1989, the American Public Communications Council ("APCC"), a payphone industry association, filed with the Commission a petition seeking a declaratory ruling

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[18] "A pay telephone is used to provide public telephone service when a public need exists, such as at an airport lobby, at the option of the telephone company and with the agreement of the owner of the property on which the phone is placed." *First Reconsideration Order*, 97 FCC 2d at 704 n.41.

[19] A private business or residential telephone would constitute an identifiable subscriber. *C.F. Communications Corp., et al. v. Century Telephone of Wisconsin, Inc., et. al.*, Memorandum Opinion and Order on Remand, 15 FCC Rcd 8759, 8762, ¶ 10 (2000) ("*Liability Order"*).

[20] *First Reconsideration Order*, 97 FCC 2d at 705, ¶ 58.

[21] "A pay telephone is used to provide ***semi-public*** telephone service when there is a combination of general public and specific customer need for the service, such as at a gasoline station or pizza parlor." *First Reconsideration Order,* 97 FCC 2d at 704, n.41 (emphasis added).

[22] *Id.* at 706, ¶ 60. The NTS costs of operating public payphones would in effect be subsidized by all interstate callers through the Carrier Common Line Charge ("CCL") assessed on IXCs. *Id.* at 705, ¶ 58.

[23] *Liability Order,* 15 FCC Rcd at 8763, ¶ 13.

[24] *See Registration of Coin Operated Telephones*, Memorandum Opinion and Order, 49 Fed. Reg. 27763 (1984).

[25] Consolidated Joint Statement (filed July 29, 2002) at 31, ¶ 127.

[26] *Id*. at 47, ¶ 205; 59, ¶ 276; 72, ¶ 350; 85, ¶ 417; 100, ¶ 495; 114, ¶ 574; 126, ¶ 644; 141, ¶ 721; 155, ¶ 799; 170, ¶ 875; 183, ¶ 941; 197, ¶ 1005; 206, ¶ 1055.

[27] *See e.g.* CVCA v. Citizens Complaint, Exh. 11 (American Payphone Systems, Inc. Informal Complaint, IC-88-04679, dated May 12, 1988); Exh. 13 (Letter from Anita J. Thomas, Carrier Analyst, Informal Complaints and Public Inquiries Branch, Enforcement Division, Common Carrier Bureau, FCC, to LeRoy Manke, Coon Valley Farmers Telephone Co, IC-89-03671, (Apr. 4, 1989) ("Apr. 4, 1989 Anita J. Thomas Letter").

[28] *See e.g.* CVCA v. Citizens Complaint, Exh. 12 (Letter from Anita J. Thomas, Carrier Analyst, Informal Complaints and Public Inquiries Branch, Enforcement Division, Common Carrier Bureau, FCC, to Lance C. Norris, American Payphones, Inc., IC-88-04679, (Sept. 14, 1988) ("Sept. 14, 1988 Anita J. Thomas Letter"); Apr. 4, 1989 Anita J. Thomas Letter. The staff letters appear to have been based on a determination that the telephone lines provided to the IPPs were "ordinary 'common lines'" and that such "[o]rdinary business telephone lines taken out of the local exchange service tariff [were] not exempt from subscriber line charges." Sept. 14, 1988 Anita J. Thomas Letter at 1.

that the Commission's rules do not authorize the assessment of the EUCL because the IPPs are not "end users" and they only owned public payphones.[29] Also in 1989, the United States District Court for the Western District of Wisconsin referred to the Commission a complaint filed by C.F. Communications Corporation ("CFC"), an IPP, which challenged the assessment of the EUCL charge by certain LECs.[30]

8. Pursuant to the district court's primary jurisdiction referral, on May 10, 1989, CFC filed 13 formal complaints with the Commission objecting to the LECs' assessment of EUCL charges.[31] The Common Carrier Bureau and the Commission denied CFC's claims.[32] In the *CFC I Order*, the Commission determined that CFC's payphones were subject to EUCL charges because CFC was an "end user" and that CFC's payphones were not "public telephones" under the Commission's rules.[33] The D.C. Circuit, however, rejected the Commission's determinations and remanded the case to the Commission.[34] The Court held that CFC was not an "end user," and, alternatively, that the Commission had improperly discriminated between similarly situated services (IPP-owned and LEC-owned public payphones) without a rational basis.[35]

9. In its April 13, 2000 *Liability Order* on remand, the Commission applied the Court's analysis and found that CFC and the other IPPs cannot be considered "end users" under Section 69.2(m).[36] The Commission also determined, however, that irrespective of whether CFC was an "end user," the primary determination the Commission should have made was whether CFC's payphones were "public" or "semi-public."[37] Accordingly, the Commission found that the LECs imposed an unreasonable charge in violation of Section 201(b) by classifying all IPP payphones as semi-public and assessing EUCL charges against IPP payphones that were deployed in the same

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[29] The American Public Communications Council Petition for Declaratory Ruling (filed April 21, 1989) ("APCC Petition"). Although the Commission has not yet ruled on APCC's petition, the *Liability Order* and our ruling today renders it moot.

[30] *C.F. Communications Corp. v. CenturyTel. of Wisconsin*, 89-C-0168-C, Order (W.D. Wis. 1989).

[31] CFC and several other IPPs subsequently filed 52 additional formal complaints raising the same allegations raised by CFC in its initial complaints. The Commission did not consolidate these complaints with the initial 13 complaints. For further discussion of these complaints s*ee Liability Order*, 15 FCC Rcd at 8760, ¶¶ 2, 4-6.

[32] *C.F. Communications Corp. v. Century Telephone of Wisconsin, Inc. et. al*., Memorandum Opinion and Order, 8 FCC Rcd 7334 (1993) ("*Bureau CFC Order"*); *C.F. Communications Corp. v. Century Telephone of Wisconsin*, *Inc., et. al.*, Memorandum Opinion and Order, 10 FCC Rcd 9775 (1995) ("*CFC I Order"*); *C.F. Communications Corp., et. al. v. Michigan Bell Telephone Co., et. al.*, Memorandum Opinion and Order, 12 FCC Rcd 2134 (1997) ("*CFC II Order"*).

[33] *CFC I Order*, 10 FCC Rcd at 9779, ¶¶ 16-20. The Commission reasoned that IPP payphones did not fall within the definition of "public telephone" under the rules at the time and thus were not exempt from the EUCL charge. *Id*. at 20.

[34] *C.F. Communications Corp. v. FCC*, 128 F.3d 735 (D.C. Cir. 1997) (*"C.F. Communications"*); *see also C.F. Communications Corp. v. FCC*, No. 97-1202, slip op. (D.C. Cir. 1997).

[35] *C.F. Communications,* 128 F.3d at 740. In addition, the Court concluded that the definition of "public telephone" relied on by the Commission had no bearing on the IPP service, but rather related to how the LECs recovered their investment in payphone equipment. *Id*.

[36] *Liability Order,* 15 FCC Rcd at 8768, ¶ 24.

[37] *Id.* at 8768, ¶ 25.

manner as LEC-owned "public payphones."[38]

10. The Commission also rejected arguments that awarding damages to the IPPs would be inappropriate because the LECs were acting in accordance with Commission rules. The Commission found that the access charge orders did not, in fact, require carriers to assess the EUCL charge indiscriminately on all IPP-owned payphones, given that the rules required LECs to evaluate whether individual payphones should be classified as "public" or "semi-public."[39] The Commission, thus, ruled that the IPPs were entitled to damages.[40] The *Liability Order* was upheld on appeal.[41] In particular, the Court held that "it was appropriate for the FCC to find the LECs liable for the EUCL charges."[42] Because the Commission had not ruled on individual damages claims, the Court also stated that it would "express no opinion as to the Commission's authority to impose damages on the LECs for charges that they may have collected in reliance on the agency's initial (and mistaken) interpretations of the *Access Charge Reconsideration* rules."[43]

B. The Current Cases

11. As a result of the D.C. Circuit's 1997 decision, the Commission received several thousand informal complaints from late 1997 through 1998 raising claims similar to those asserted by CFC.[44] Because the issues raised by the IPPs in their informal complaints were similar to those being considered by the Commission in the remand proceeding, for administrative efficiency, Commission staff issued a waiver order tolling for a number of informal complaints the six-month relation back requirement contained in Section 1.718 of the Commission's rules.[45] Pursuant to the waiver order, any informal complaint relating to issues raised in the CFC proceeding that had to be converted to a formal complaint pursuant to Section 1.718 after June 15, 1998, would be deemed to relate back to the filing date of the relevant informal complaint if it was filed no later than 90 days after a final nonappealable order had been entered in that proceeding.[46] The Enforcement Bureau has extended the waiver order several times since then to allow parties to await the Commission's adjudication of the formal complaints presently before us.[47]

12. The cases now before us arise from a number of the previously-mentioned informal complaints, which have been converted to formal complaints. Complainants allege that Defendants violated the Commission's rules,[48] as well as Sections 201(b) and 203(c) of the Act[49] by imposing

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38 *Id.* at 8766, ¶ 20; 8768, ¶ 26.

39 *Id.* at 8768, ¶ 27.

40 *Id.* at 8769, ¶ 28.

41 *See Verizon Telephone Companies v. FCC*, 269 F.3d 1098 (DC Cir. 2001) ("*Verizon*").

42 *Id.* at 1101.

43 *Id.*

44 *Liability Order,* 15 FCC Rcd at 8766, ¶ 7. The Commission's database presently lists close to 3000 informal complaints disputing the EUCL charge. *See* June 29, 2001 FCC Open and Pending List for EUCL Informal Complaints.

45 *First Waiver Order*, 16 FCC Rcd at 3671, ¶ 5; 3672, ¶ 8.

46 *Id.* at 3671, ¶ 5; *Liability Order,* 15 FCC Rcd at 8773, ¶ 39.

47 *Third Waiver Order*, at ¶ 2*; Second Waiver Order*, 17 FCC Rcd at 2226, ¶ 3.

48 During the relevant period, 47 C.F.R. § 69.104(a) stated:

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EUCL charges on Complainants' payphones.[50] Complainants assert here that it was not proper to assess the EUCL on any of their payphones, regardless of whether they were public or semi-public, because Complainants are not "end users."[51] Complainants also seek a waiver of the Section 415(b) statute of limitations in order to obtain damages for all improperly assessed EUCL charges, regardless of when their informal complaints were filed.[52]

13. Defendants deny Complainants' allegations and maintain that their imposition of EUCL charges on Complainants' payphones was consistent with the Commission's rules.[53] Furthermore, Defendants raise a number of defenses regarding the payment of damages to Complainants. In particular, Defendants argue that, regardless of liability, equitable principles bar any recovery by Complainants.[54] Defendants also maintain that any recovery of damages is subject to the two-year limitations period in Section 415 of the Act.[55] In addition, Defendants argue that certain claims

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> A charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service, Centrex or semi-public coin telephone service to the extent they do not pay carrier common line charges….

[49] Section 201(b) of the Act provides, in pertinent part, that "[a]ll charges [and] practices… in conjunction with such communications service shall be just and reasonable, and any such charge [or] practice…that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b). Section 203(c) of the Act states that a carrier must provide communications services in strict accordance with the terms and conditions contained in its tariff. 47 U.S.C. § 203(c). Section 203(c), therefore, prohibits the imposition of a charge not specified in a carrier's tariff. *See AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 222 (1988).

[50] *See, e.g.* CVCA v. Citizens Complaint at II-1- II-3, ¶¶ 1-3; II-6 – II-12, ¶¶ 10-22; II-13 – II-14, ¶¶ 23-25. Because the citations to the legal analysis sections of all the complaints are identical, citations to Complainants' legal analysis will hereinafter be referred to as "Complainants' Legal Analysis." *See* Letter from Katherine J. Henry, counsel for Complainants, dated Oct. 17, 2002, to Rosemary McEnery, Attorney, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission.

[51] *See* Complainants' Legal Analysis at II-3 – II-5, ¶¶ 4-7; II-5 – II-6, ¶ 8.

[52] *Id.* at II-28 – II-57, ¶¶ 50-99.

[53] *See* Citizens Memorandum of Law, File Nos. EB-02-MD-018 and EB-02-MD-029 (filed July 15, 2002) ("Citizens Supplemental Answer") at III-23 – III-32; Qwest Corporation's Revised Legal Analysis in Support of its Answer to the Formal Complaint of CVCA, File No. EB-02-MD-019 (filed July 15, 2002) ("Qwest Supplemental Answer") at III-5 – III-13; Supplemental Answer of Verizon New England Inc. to IMR Capital Corporation's Complaint, File No. EB-02-MD-020 (filed July 15, 2002) ("Verizon New England Supplemental Answer") at B20 – B29; ALLTEL Supplemental Answer at IV-1 – IV-3; SBC's Revised Legal Analysis, File Nos. EB-02-MD-022; EB-02-MD-028; and EB-02-MD-030; (filed July 15, 2002) ("SBC Supplemental Answer") at III-23 – III-31; BellSouth Supplemental Legal Analysis, File No. EB-02-MD-023 (filed July 15, 2002) ("BellSouth Supplemental Answer") at II-22 – II-30; Century Supplemental Answer at IV-1 – IV-3; TDS Telecom's Supplemental Answer to ITC's Complaint, File No. EB-02-MD-025 (filed July 15, 2002) ("TDS Supplemental Answer") at 21 - 30; Supplemental Answer of Verizon North Inc. to Indiana Telcom Corporation's Complaint, File No. EB-02-MD-026 (filed July 15, 2002) ("Verizon North Supplemental Answer") at B-20 – B-29; Supplemental Answer of Verizon Delaware Inc., Verizon New Jersey Inc. and Verizon Pennsylvania Inc. to National Telecoin Corporation's Complaint, File No. EB-02-MD-027 (filed July 15, 2002) ("Verizon Delaware Supplemental Answer") at B-20 – B-29.

[54] Citizens Supplemental Answer at III-4 – III-20; Qwest Supplemental Answer at III-14 – III-31; Verizon New England Supplemental Answer at B-3 – B-20; ALLTEL Supplemental Answer at IV-5 – IV-6; SBC Supplemental Answer at III-3 – III-23; BellSouth Supplemental Answer at II-3 – II-20; Century Supplemental Answer at IV-3 – IV-6; TDS Supplemental Answer at 3 - 20; Verizon North Supplemental Answer at B-3 – B-20; Verizon Delaware Supplemental Answer at B-3 – B-20.

[55] Citizens Supplemental Answer at III-33 – III-53; Qwest Supplemental Answer at III-32 – III-55; Verizon New England Supplemental Answer at B-28 – B-52; ALLTEL Supplemental Answer at IV-7 – IV-9; SBC Supplemental (continued....)

should be barred for procedural reasons.[56]

14. In order to expedite resolution of the key legal issues common to these complaints (and to the pending informal complaints), we bifurcated the proceeding, deferring the calculation of Complainants' individual damages claims and related Complainant-specific damages issues to a later phase.[57]

C. Summary of the Decision

15. In this order we conclude that the LEC Defendants violated Section 201(b) of the Act and Part 69 of the Commission's rules by imposing EUCL charges on IPP payphones, and that Complainants are entitled to recover damages. Further, we decline to toll the applicable statute of limitations of Section 415(b), and therefore, such damages are limited to the period beginning two years prior to the filing of the informal complaints.

III. DEFENDANTS VIOLATED THE ACT AND COMMISSION RULES BY IMPOSING EUCL CHARGES ON COMPLAINANTS' PAYPHONES

16. Complainants assert that Defendants' imposition of EUCL charges on their payphones violated the Act and the Commission's rules. We have already found, in the 2000 *Liability Order*, that imposing EUCL charges on public IPP payphones violated Section 201(b) of the Act and Part 69 of the Commission's rules.[58] Complainants ask us to affirm that that ruling applies to these cases,

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Answer at III-33 – III-52; BellSouth Supplemental Answer at II-30 – II-55; Century Supplemental Answer at IV-7 – IV-9; TDS Supplemental Answer at 30 - 53; Verizon North Supplemental Answer at B-28 – B-52; Verizon Delaware Supplemental Answer at B-30 – B-53.

[56] Citizens Supplemental Answer at III-56 – III-60; Qwest Supplemental Answer at III-55 – III-58; Verizon New England Supplemental Answer at B-54 – B-55; ALLTEL Supplemental Answer at IV-9 - IV-10; SBC Supplemental Answer at III-57 – III-61; BellSouth Supplemental Answer at II-55 - II-60; Century Supplemental Answer at IV-9 - IV-10; TDS Supplemental Answer at 53 - 58; Verizon North Supplemental Answer at B-53 – B-54; Verizon Delaware Supplemental Answer at B-54.

[57] *See* May 1, 2002 Letter Ruling at 7. Section 208(a) of the Act provides the Commission with discretion to bifurcate liability and damages issues on its own motion. *See Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Memorandum Opinion and Order, 12 FCC Rcd 22497, 22575 (1997) ("*Formal Complaints Order*"). *See also Verizon*, 269 F.3d at 1105.

In light of the bifurcation, we hereby vacate our February 27, 2002 Letter Ruling to the extent it relates to the provision of copies of supporting documentation, and the corresponding confidentiality designation, because these materials relate only to the damages phase. *See* Letter from Tracy E. Bridgham, Special Counsel, Market Disputes Resolution Division, Enforcement Bureau to all counsel, File Nos. EB-02-MD-018 – 030 (Feb. 27, 2002) ("February 27, 2002 Letter Ruling"). Having vacated the Letter Ruling, the motions of several Defendants challenging it are thus dismissed as moot. *See* Letter from Aimee Jimenez, counsel for Qwest, to Tracy Bridgham, Special Counsel, Market Disputes Resolution Division, Enforcement Bureau, File Nos. EB-02-MD-018 – 030 (Feb. 28, 2002) ("Qwest Petition for Reconsideration"); SBC's Application for Review, File Nos. EB-02-MD-018 – 030 (filed Mar. 29, 2002) ("SBC Application for Review"); Letter from Margot Humphrey, counsel for TDS, to Tracy Bridgham, Special Counsel, Market Disputes Resolution Division, Enforcement Bureau, File Nos. EB-02-MD-018 – 030 (Feb. 28, 2002) ("TDS Request for Clarification"). To the extent the TDS Request for Clarification sought an initial ruling on the statute of limitations issue, that request is also moot.

[58] *See Liability Order*, 15 FCC Rcd at 8766, ¶ 20.

and Defendants do not challenge the applicability of the *Liability Order*. Therefore, we affirm and apply that portion of the *Liability Order* here.

17. We also find, as explained below, that Defendants violated Section 201(b) of the Act and Part 69 of the Commission's rules by imposing EUCL charges on semi-public IPP phones.

A. Defendants Violated Section 201(b) of the Act and Part 69 of the Commission's Rules by Imposing a EUCL Charge on Complainants' Payphones, Because the IPPs Were Not "End Users"

18. In the *Liability Order*, the Commission found that the IPPs "cannot be considered 'end users' under Section 69.2(m), because they do not own the premises where their payphones are located."[59] In light of the Court's concerns that the Commission had improperly discriminated between similarly-situated payphone services, however, the Commission also stated that, "irrespective" of whether IPPs are "end users," the "appropriate distinction to apply to determine whether the EUCL would apply to [IPP] payphones was the 'public/semi-public' distinction."[60] Thus, the Commission concluded in that case that the imposition of EUCL charges on ***public*** IPP payphones was improper, but that the assessment of such charges on semi-public IPP phones was permissible.[61] The *Liability Order* was upheld by the D.C. Circuit.[62]

19. Complainants here raise an argument that has never been addressed in light of the public/semi-public distinction established in the *Liability Order*.[63] Complainants contend that it was unlawful for Defendants to assess EUCL charges on ***any*** IPP payphones – including semi-public payphones. The Complainants argue that both the Commission and D.C. Circuit have squarely held that IPPs were not "end users" within the meaning of Section 69.2(m), and thus they were not subject to the rule governing EUCL charges at all. As a result, according to Complainants, notwithstanding the Commission's prior statement in the *Liability Order*, the semi-public/public distinction is actually irrelevant to the issue of whether EUCL charges were properly assessed on IPP payphones.[64] We agree. We find that, because Complainants were not "end users" within the meaning of Section 69.2(m), they were not within the scope of the EUCL rule, and charges levied against them – regardless of whether the payphones were public or semi-public – were unlawful.

20. There is no question that the Commission's rules allowed LECs to impose EUCL charges, as the name itself suggests, only on "end users":

> A charge that is expressed in dollars and cents per line per month shall be assessed upon ***end users*** that subscribe to local exchange telephone service, Centrex or semi-public coin telephone service to

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59 *Id.* at 8768, ¶ 24.

60 *Id.* at 8767, ¶ 21.

61 *See* i*d*. at 8766-71, ¶¶ 20-25, 33.

62 *Verizon,* 269 F.3d at 1112.

63 Complainants in the prior case did not raise this "end user" argument in a petition for reconsideration following the *Liability Order* – nor was it presented to the Court of Appeals.

64 *See* Complainants' Legal Analysis at II-5 - II-6, ¶¶ 8-9.

> the extent they do not pay carrier common line charges. [65]

If an entity is an "end user" as defined by the rules, only then is it necessary to determine whether it "subscribe[s] to . . . semi-public" service.[66] Under the plain language of the rule, however, if an entity is not an "end user" in the first place, then the semi-public distinction is irrelevant.

21. Rule 69.2(m) defined "end user" as:

> [A]ny customer of an interstate . . . telecommunications service that is not a carrier except that a carrier . . . shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a[n] . . . entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller.[67]

The D.C. Circuit and the Commission have both previously found that IPPs are not "end users" under this rule. The Court of Appeals, in its first decision in *C.F. Communications*, found that CFC was not an "end user" under the rule,[68] rejecting the Commission's analysis that CFC was an "end user" because, according to the Commission, it "offers telecommunications service exclusively as a reseller" with all such transactions "originat[ing] on [CFC's] premises."[69] The Commission had construed "premises" to mean the actual payphone equipment, which was owned by the IPPs, but the court rejected that interpretation. Similarly, on remand, the Commission held that "[i]n light of the court's ruling, we now find that CFC and the other IPPs cannot be considered 'end users' under Section 69.2(m)."[70] The Complainants here, like CFC, do not own the premises on which their payphones are located;[71] thus they are not "end users" within the meaning of 69.2(m). Therefore, they were not subject to the EUCL charge regardless of whether their payphones were public or semi-public.

22. We recognize that our decision here differs from our conclusion in the *Liability Order*. We note also, however, that this is the first opportunity we have had to squarely address the

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65 47 C.F.R. § 69.104(a) (emphasis added).

66 *Id.*

67 47 C.F.R. § 69.2(m).

68 *See C.F. Communications*, 128 F.3d at 739. The Court reasoned that, because CFC is a "carrier," then it can only be an "end user" under the rule (1) if it "uses a telecommunications service for administrative purposes" (and no one suggested that IPPs used payphones for such purposes) or (2) if CFC "offers telecommunications services exclusively as a reseller" and if all such transactions "originate on the premises of such reseller." *Id.* at 738. Thus, the Court's conclusion that calls did not originate on CFC's premises necessarily means that CFC is ***not*** an "end user." *See id.* at 740.

69 *C.F. Communications*, 128 F.3d at 737-38.

70 *Liability Order*, 15 FCC Rcd at 8768, ¶ 24.

71 Defendants concede that Complainants "had no property interest whatsoever in the premises where their payphones were installed." Citizens Supplemental Answer at III-25; Qwest Supplemental Answer at III-8; Verizon New England Supplemental Answer at B-23; ALLTEL Supplemental Answer at IV-2; SBC Supplemental Answer at III-25; BellSouth Supplemental Answer at II-24; Century Supplemental Answer at IV-2; TDS Supplemental Answer at 24; Verizon North Supplemental Answer at B-23; Verizon Delaware Supplemental Answer at B-23.

argument raised by Complainants.[72] Upon a thorough review of the relevant rules and precedents, we now conclude that our prior focus on the public/semi-public distinction, rather than the threshold "end user" determination, was incorrect.[73]

23. The D.C. Circuit, in its first decision in *C.F. Communications*, criticized the Commission's unequal treatment of similarly-situated payphones. In the *Liability Order*, the Commission focused on treating the IPP and LEC payphones the same in terms of the EUCL charge and thus viewed the public/semi-public distinction as determinative. Given the clear wording of the access charge rules in place at the time, however, because the IPPs were ***not*** "end users," as defined by 69.2(m), they were not subject to the EUCL charge.[74] Defendants, moreover, offer ***no*** explanation of how a charge that may be levied only on "end users" may be assessed upon entities that explicitly have been found not to be "end users." Therefore, we find that Defendants' assessment of EUCL charges on IPP payphones prior to 1997 – whether public or semi-public – violated Section 201(b) of the Act and Part 69 of the Commission's rules. While this differs in part from the *Liability Order*, it is important to note that our prior view regarding the imposition of EUCL charges on semi-public IPP payphones could not even arguably engender further reliance on the part of Defendants since the access charge rules were amended ***before*** the *Liability Order* was released in April 2000. Any assertion by the LECs regarding reliance could only be based on the 1995 Commission Order, or earlier pronouncements by the Common Carrier Bureau.

24. Defendants contend that Complainants were "end users," in any event, because they were acting as agents of the premises owners (who, they argue, were "end users"). Defendants assert that Complainants were therefore liable for the EUCL charges to the same extent their principals would have been.[75] We reject this argument.

25. First, Defendants cannot use an agency theory to avoid liability for EUCL charges assessed on ***public*** payphones. As discussed in detail above, the Commission has previously held that "end users" of public payphones are ***exempt*** from EUCL charges.[76] This liability determination was upheld by the D.C. Circuit.[77] Thus, even the premises owners would not have been subject to EUCL charges. Defendants admit as much when they acknowledge that they did not assess EUCL

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72 *See* n.63, *supra.*

73 We note that the public/semi-public distinction may well prove to be a distinction without a difference. Complainants contend that virtually all the IPP-owned payphones were public. This is consistent with the Commissions' understanding of the payphone business – notably that semi-public service was for customers who desired coin phones but where the traffic did not justify the placement of a payphone. Because of this, it appears unlikely that the IPPs, who were new entrants in this market, would have sought to provide semi-public service. Because we bifurcated liability and damages in the thirteen cases currently before us, however, we left discovery regarding whether the IPP phones were public or semi-public for the next phase of the proceeding. Thus, we cannot unequivocally find here that no IPP-owned semi-public payphones existed.

74 47 C.F.R. § 69.104(a).

75 Citizens Supplemental Answer at III-24 – III-26; Qwest Supplemental Answer at III-7 – III-9; Verizon New England Supplemental Answer at B-22 – B-24; ALLTEL Supplemental Answer at IV-2; SBC Supplemental Answer at III-24 – III-26; BellSouth Supplemental Answer at II-22 – II-25; Century Supplemental Answer at IV-2; TDS Supplemental Answer at 23-25; Verizon North Supplemental Answer at B-22 – B-24; Verizon Delaware Supplemental Answer at B-22 – B-24.

76 *Liability Order*, 15 FCC Rcd at 8762-3, ¶ 11.

77 *See Verizon*, 269 F.3d at 1112.

charges on the owners of the premises where their own public payphones were located.[78]

26. In any event, Defendants have established no basis for imputing any liability of the premises owner to the Complainants for any payphones (public or semi-public). Defendants claim that Complainants were agents of the premises owners by virtue of explicit written agency agreements executed by a number of Complainants.[79] Even without such a contract, Defendants claim that an agency relationship can be inferred from the circumstances.[80] According to Defendants, only the premises owner had the right to authorize installation of a phone on its premises, and thus the only way Complainants could have ordered phone service from Defendants was "as the agent for the premises owner" and subject to the owner's control.[81]

27. Agency is defined in the Restatement as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." [82] A critical element is that "the principal is to be in control of the undertaking."[83] The "name which the parties give to the relation is not determinative,"[84] and the burden of proving agency rests on the party asserting its existence.[85] We find that neither the written agreements nor the circumstances subjected IPPs to the premises owner's control, and that the IPPs, in any event, were acting in their own interests in installing and maintaining payphones.

28. The written agreements relied on by Defendants are licensing agreements authorizing IPPs to install and maintain payphones. Under these agreements, the premises owners control nothing, but rather are paid a commission in consideration for the use of the space.[86] Significantly, the agreements referenced by Defendants provide that the IPP has "sole discretion to determine the number of payphones to be installed."[87] The IPP owns, installs and maintains the phones and under

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78 *See* n.26, *supra.*

79 Citizens Supplemental Answer at III-24; Qwest Supplemental Answer at III-7; ALLTEL Supplemental Answer at IV-2; SBC Supplemental Answer at III-24; BellSouth Supplemental Answer at II-22 - II-23; Century Supplemental Answer at Section IV-2; TDS Supplemental Answer at 23; Verizon North Supplemental Answer at B-22 - B-23; Verizon Delaware Supplemental Answer at B-22 - B-23.

80 Citizens Supplemental Answer at III-25; Qwest Supplemental Answer at III-8; Verizon New England Supplemental Answer at B-23; SBC Supplemental Answer at III-25; BellSouth Supplemental Answer at II-24; TDS Supplemental Answer at 24; Verizon North Supplemental Answer at B-23; Verizon Delaware Supplemental Answer at B-23.

81 *Id.*

82 Restatement (Second) of Agency § 1 (1958).

83 *Id.* § 1 cmt. b ("It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements.")

84 *Id.* § 13 cmt. c.

85 *See, e.g., Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1104 (10th Cir. 1999).

86 *See* Affidavit of William J. Nelson at ¶¶ 6-7, attached as Exhibit 7 to the following complaints: ITC v. ALLTEL; ITC v. Ameritech; ITC v. BellSouth; ITC v. Century; ITC v. TDS; and ITC v. Verizon North (ITC did not "receive any payments, or charge any fees, for installing or maintaining payphones at particular locations. To the contrary, [ITC] invariably had to contract with, and pay, site owners or commercial tenants for authorization to install and maintain payphones on premises that they owned or leased.")

87 *See, e.g.,* TDS Supplemental Answer, Exhibit 10.

the agreements is given unrestricted access to its phones.[88] Indeed, several agreements cited by Defendants refer to the premises owner as a "space provider" and "site provider," which is far from the notion Defendants seek to portray of premises owners as "principals" who control and supervise their agents (the IPPs).[89]

29. Nor have Defendants established that an agency relationship can be inferred from the circumstances. While authorization to install phones on the premises was required, Defendants point to no facts suggesting that any premises owner here controlled a Complainant or that any Complainant was not acting pursuant to its own independent business interests. In sum, no agency relationship existed between Complainants and the premises owners on which Defendants can premise their claim of imputed liability.

B. Section 203

30. Complainants also assert that the imposition of the EUCL charge prior to 1997 violated Section 203 of the Act and the Filed Rate Doctrine.[90] Paralleling their Section 201 claim, Complainants allege that Defendants' tariffs limited EUCL charges to "end users," and that both the D.C. Circuit and the Commission have specifically held that IPPs are not "end users."[91] Having concluded that Defendants violated Section 201(b) by assessing the EUCL charges on Complainants prior to 1997, we do not need to reach Complainants' tariff violation claims under Section 203 and the Filed Rate Doctrine.[92]

IV. COMPLAINANTS ARE ENTITLED TO RECOVER DAMAGES FOR DEFENDANTS' UNLAWFUL ASSESSMENT OF EUCL CHARGES

31. Having determined that Defendants violated the Act and Commission rules by assessing EUCL charges on IPP payphones, we now address the extent to which an award of damages is appropriate.[93] Defendants argue that because the Commission approved the practice of imposing EUCL charges on Complainants (a decision that was later reversed), Complainants' sole remedy for payment of unlawful EUCL charges is restitution, which would be limited to the disgorgement of any unjust enrichment. Defendants further contend that they were not unjustly enriched by collecting EUCL charges from the IPPs because, had they not done so, they would have recovered

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88 *Id.*

89 *See* Qwest Supplemental Answer, Exhibit 1, Attachments A and B.

90 *See* Complainants' Legal Analysis at II-13 - II-14, ¶¶ 23-25.

91 *Id.*

92 Several Defendants argue that Complainants' claims pursuant to Section 203 of the Act and the filed rate doctrine are barred because they did not raise them in their informal complaints. *See* TDS Supplemental Answer at 29; Qwest Supplemental Answer at III-13; ALLTEL Supplemental Answer at IV-3; BellSouth Supplemental Answer at II-29; Century Supplemental Answer at IV-3; Verizon New England Supplemental Answer at B-27; Verizon North Supplemental Answer at B-27; Verizon Delaware Supplemental Answer at B-27 to B-28. Having concluded above that we need not reach the Section 203 and filed rate doctrine claims for purposes of this Order, we likewise need not address whether the informal complaints adequately raised these claims.

93 Although we deferred the calculation of damages until the second phase of this proceeding, we analyze the imposition of damages here in order to facilitate the resolution of these thirteen formal complaints as well as the 3000 pending informal complaints. The parties were on notice that we would address these threshold damages issues at this stage of the proceeding. *See* May 1, 2002 Letter Ruling at 7.

the same amounts from the IXCs. Thus, according to Defendants, Complainants are not entitled to any recovery. We disagree with Defendants and find that the imposition of compensatory damages pursuant to Section 206 of the Act is appropriate here.[94]

A. Equitable Considerations Do Not Bar an Award of Damages Here

32. In the *Verizon* case, the LECs contested both liability for the illegal assessment of EUCL charges on IPPs as well as the imposition of damages. Defendants in that case argued, as they have here, that they may not be sanctioned for conduct expressly approved by the Commission and that "restitution, and not legal damages, is the sole remedy available to the IPPs."[95] In support of their equitable defense to damages here, Defendants suggest that the Court of Appeals "effectively overrule[ed]" the Commission's prior *Liability Order* in terms of damages.[96] This argument does not constitute a basis upon which Defendants can avoid the imposition of damages. The *Liability Order* rejected the Defendants' arguments that the award of damages would be inappropriate in that proceeding. On appeal, the D.C. Circuit declined to address the damages issue on grounds that it was not ripe, leaving Defendants free to raise it in a subsequent proceeding.[97] By indicating that Defendants "are not foreclosed from presenting their equitable concerns to the agency during the next stage of the proceedings," the Court did not by any means reject the Commission's position.[98]

33. We have considered Defendants' equitable defenses and conclude that, on balance, any inequity to Defendants in awarding damages is outweighed by the imposition of unlawful charges on Complainants. In determining whether the LECs could be held liable for violating Section 201 of the Act by assessing EUCL charges on IPPs, the D.C. Circuit analyzed a line of cases addressing the retroactive applications of judicial reversals of agency determinations. In its analysis, the D.C. Circuit recognized a distinction between new applications of law and "the substitution of new law for old law that was reasonably clear."[99] According to the Court, where the case involves "'new applications of existing law, clarifications, and additions,' the court starts with a presumption in favor of retroactivity."[100] Retroactivity will be denied, however, "when to apply the new rule to past conduct or to prior events would work a 'manifest injustice.'"[101] The Court stated that it has articulated its retroactivity standard in a number of ways – from a five-factor balancing test to a

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94 While we conclude here that an award of damages is appropriate, we defer the calculation of damages for each Complainant to the second phase of this proceeding. *See id*. Such calculation will be based on the amount of EUCL charges actually paid by each Complainant to Defendants during the applicable time period.

95 *Verizon*, 296 F.3d at 1100, 1112.

96 Citizens Supplemental Answer at III-11; Qwest Supplemental Answer at III-22; Verizon New England Supplemental Answer at B-11; SBC Supplemental Answer at III-11; BellSouth Supplemental Answer at II-10 - II-11; TDS Supplemental Answer at 10; Verizon North Supplemental Answer at B-11; Verizon Delaware Supplemental Answer at B-11. *See also* ALLTEL Supplemental Answer and Century Supplemental Answer at IV-3, referencing Citizens Supplemental Answer at 4-20**.**

97 *Verizon,* 269 F. 3d at 1101, 1112 ("We therefore express no opinion as to the Commission's authority to impose damages on the LECs for charges that they may have collected in reliance on the agency's initial (and mistaken) interpretation of the *Access Charge Reconsideration* rules.")

98 *Id.* at 1112.

99 *Id.* at 1109, quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993).

100 *Id.* At 1109, citing *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 424 (D.C. Cir. 1994) (emphasis added).

101 *Id.* (citations omitted).

three-factor approach – and most recently indicated that the analysis "'boil[s] down to a question of concerns grounded in notions of equity and fairness.'"[102] Such a balancing of equities likewise compels the conclusion that Defendants should be liable to Complainants for damages for the unlawful imposition of EUCL charges.

34. Here, the Defendants argue that they assessed the EUCL charges "pursuant to the Commission's explicit guidance and direction" since at least 1988.[103] Specifically, Defendants allege that such guidance was in the form of two informal staff letters issued in response to informal complaints.[104] As the Commission noted in the *Liability Order*, however, the two unpublished staff letters "are not binding on the Commission."[105] And, as the D.C. Circuit has stated, advice by staff members does not bind the Commission and does not excuse parties who rely on such advice and rulings from the consequences of their conduct.[106] Any purported reliance on these letters simply does not constitute a basis upon which Defendants can avoid payment of damages.

35. In addition, Defendants maintain that the 1993 Common Carrier Bureau order and the 1995 Commission order affirming it (and finding the assessment of EUCL charges on IPPs was proper), firmly established the Commission's policy.[107] The Commission order, however, was reversed on appeal by the D.C. Circuit on grounds that the Commission's interpretation of its own access charge rules was clearly erroneous.[108] The vacated orders did not purport to establish new rules or impose new requirements upon the LECs. Rather, in adjudicating the lawfulness of the EUCL charges at issue, the Commission and its staff interpreted and applied -- albeit erroneously -- the access charge requirements that had governed the LECs' assessment of EUCL charges since 1983.

36. On balance, we believe that the Complainants' equitable interest in receiving compensation for payment of unlawfully assessed charges, and the Commission's interest in correcting its error and adjudicating the case in accordance with the proper interpretation of its regulations, outweighs any reliance the Defendants may have had in the correctness of the Commission's initial interpretation (before it was struck down on judicial review). The D.C. Circuit has recognized "a strong equitable presumption in favor of retroactivity that would make the parties whole."[109] Where, as here, the Commission in an earlier phase of the case committed legal error, it

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[102] *See id.* at 1109-10, citing *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996).

[103] Citizens Supplemental Answer at III-4 – III-5; Qwest Supplemental Answer at III-15 – III-16; Verizon New England Supplemental Answer at B-3 - B-4; ALLTEL Supplemental Answer at IV-3 – IV-4; SBC Supplemental Answer at III-3 – III-4; BellSouth Supplemental Answer at II-3 - II-4; Century Supplemental Answer at IV- 3 – IV-4; TDS Supplemental Answer at 3-4; Verizon North Supplemental Answer at B-3 - B-4; Verizon Delaware Supplemental Answer at B-3 - B-4.

[104] *See id.*, citing Apr. 4, 1989 Anita J.Thomas Letter and Sep. 14, 1988 Anita J. Thomas Letter.

[105] *Liability Order*, 15 FCC Rcd at 8769, ¶ 28.

[106] *See e.g., Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991) ("*Malkan*").

[107] Citizens Supplemental Answer at III-5 – III-6; Qwest Supplemental Answer at III-16 – III-17; Verizon New England Supplemental Answer at B-5; ALLTEL Supplemental Answer at IV-3 – IV-4; SBC Supplemental Answer at III-4 – III-5; BellSouth Supplemental Answer at II-4 - II-5; Century Supplemental Answer at IV-3 – IV-4; TDS Supplemental Answer at 3-4; Verizon North Supplemental Answer at B-5; Verizon Delaware Supplemental Answer at B-5.

[108] *C.F. Communications*, 128 F.3d at 742.

[109] *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999).

is appropriate for the agency to "put the parties in the position they would have been in had the error not been made."[110] It is undisputed that the 1983 access charge rulemaking, correctly interpreted, prohibited the LECs from assessing EUCL charges on public payphones. Even if the LECs had believed the EUCL charges were lawful, the D.C. Circuit in *C.F. Communications* found that those charges had violated the requirements in the 1983 access charge rulemaking. It was appropriate for the Commission, in exercising its adjudicatory authority under Section 208, to require the LECs to reimburse the Complainants for the unlawful charges they paid. As the Court of Appeals stated in the *Verizon* case:

> [T]he agency pronouncements on which the LECs relied were subsequently held by this court to be mistaken as a matter of law. As such, the FCC's *Liability Order* was largely an exercise in error correction. We have previously held that administrative agencies have greater discretion to impose their rulings retroactively when they do so in response to judicial review, that is, when the purpose of retroactive application is to rectify legal mistakes identified by a federal court.[111]

Awarding damages put the parties in the position they would have been in if the Commission's error had not been made.

37. We do not believe that any purported reliance on the Commission's vacated orders should exempt Defendants from paying damages. The LECs began assessing EUCL charges on all IPP-owned payphones years ***before*** the agency issued the staff letters or the vacated orders.[112] Moreover, the vacated orders never became settled law on which the LECs were entitled to rely. The IPPs immediately sought judicial review, thereby putting the LECs on notice that the Court might invalidate them and adopt a different interpretation of the 1983 access charge requirements. In fact, in refuting Complainants' arguments for tolling the statute of limitations, Defendants themselves "emphasize at the outset that there was never a final, unappealable determination by any tribunal that Complainants were without a remedy for the charges imposed here."[113] As the D.C. Circuit stated in the *Verizon* case:

> [T]he agency orders on which the LECs claim to have relied not only had never been judicially confirmed, but were under unceasing challenge before progressively higher legal authorities. .. Because the object of the LECs' reliance was neither settled (but was rather perpetually enmeshed in litigation) nor 'well-established,' . . . we are skeptical that retroactive liability against the LECs would impose a

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110 *Id.*

111 *Verizon*, 269 F.3d at 1111 (citations omitted); *see also Pub. Utilities Com'n of Calif. V. FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993) (Agency discretion "is often at its 'zenith' when the challenged action relates to the fashioning of remedies.") (citations omitted).

112 *See Liability Order*, 15 FCC Rcd at 8768, ¶ 28

113 Citizens Supplemental Answer at III-43; Qwest Supplemental Answer at III-42; Verizon New England Supplemental Answer at B-42; SBC Supplemental Answer at III-44; BellSouth Supplemental Answer at II-42; TDS Supplemental Answer at 41; Verizon North Supplemental Answer at B-42; Verizon Delaware Supplemental Answer at B-42.

manifest injustice.[114]

38. Moreover, to the extent that Defendants might have recovered their costs from IXCs if they had not assessed the EUCL on IPPs, Defendants are not entirely without recourse. Commission rules provide a mechanism whereby Defendants can seek to demonstrate that the damages paid to the Complainants constitute "extraordinary cost changes," thus increasing the permitted price caps.[115] Complainants, on the other hand, have no other practical recourse. They were required to pay the EUCL to maintain their payphone service despite their legal objections. An award of damages here is justified in order to "make whole parties who are clearly injured" by unlawful rates.[116] The IPPs should not be deprived of a remedy for paying unlawful rates merely because the Commission made a legal error in an earlier phase of this adjudication. The Commission has the authority "to 'undo what was wrongfully done by virtue of its prior order.'"[117]

39. Therefore, assuming that equitable considerations are appropriate in a Section 208 complaint case, we find that the balance of equities tips decidedly in favor of awarding damages to Complainants, and we decline to grant any equitable offset based on claims of detrimental reliance. Defendants will be required to pay damages to Complainants based on the amount of EUCL charges assessed.

B. Complainants Are Not Limited To Recovery in Restitution

40. Defendants contend that, "[w]here a party pays amounts pursuant to an agency's requirements, and those requirements are later held to be unlawful, the payor has, if anything, a claim for restitution."[118] Contrary to the Defendants' insistence that an action in restitution for unjust enrichment is the sole remedy available to Complainants, the Communications Act explicitly provides Complainants with a legal remedy for redress of injuries suffered as a result of a carrier's violation of the Act. Defendants' assertion ignores the fact that Complainants have invoked this statutory scheme.

41. An action in restitution is fundamentally different from the statutory claim for damages which Complainants have brought. As the D.C. Circuit has stated, Section 206 of the Act is "phrased in mandatory terms: A carrier that has violated the Act 'shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such

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114 *Verizon*, 269 F.3d at 1110-11 (citations omitted). *See Exxon Co.*, 182 F.3d at 49 (Retroactivity is not impermissible where, as here, the affected parties have notice "that resolution of some specific issue may cause a later adjustment."). *See, e.g., OXY USA, Inc. v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995); *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 232-233 (D.C. Cir. 1995).

115 *See* 47 C.F.R. § 61.45(d)(vi).

116 *Exxon Co.*, 182 F.3d at 49. *See also Cities of Carlisle and Neola, Iowa v. FERC*, 741 F.2d 429, 433 (D.C. Cir. 1984).

117 *Public Utilities Commission of the State of California*, 988 F.2d at 163, quoting *United Gas Improvement Co. v. Callery*, 382 U.S. 223, 229 (1965), reh. denied, 382 U.S. 1001 (1966) (ellipses and brackets omitted).

118 Citizens Supplemental Answer at III-4; Verizon New England Supplemental Answer at B-3; SBC Supplemental Answer at 3; BellSouth Supplemental Answer at II-3; TDS Supplemental Answer at 3; Verizon North Supplemental Answer at B-3; Verizon Delaware Supplemental Answer at B-3. *See also* ALLTEL Supplemental Answer and Century Supplemental Answer at IV-2 – IV-3, incorporating by reference Citizens Supplemental Answer at III-4.

violation.'"[119] Section 209, likewise, provides that, if the Commission determines that a complainant is entitled to an award of damages, the Commission "shall" order the carrier to pay the complainant the sum to which it is entitled.[120] Thus, Section 206 – in explicit terms – makes the Defendants liable to the Complainants in damages for any injuries they inflicted on the IPPs by unlawfully assessing EUCL charges. And Section 209 requires the Commission, upon making the necessary findings, to order the Defendants to pay such damages. Therefore, because we have found that the imposition of damages would not work a manifest injustice,[121] we believe that Sections 206 and 209 require the imposition of damages in this case.

42. Significantly, moreover, the statute does ***not*** limit Complainants' remedy to restitution – nor should such a theory be superimposed upon the statute. Damages is a form of remedy that is wholly distinct from equitable remedies such as restitution:

> Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss.[122]

Compensatory damages are designed to make the plaintiff whole, while restitution looks at the extent to which a defendant has benefited.[123] The purpose of Section 206, by its terms, is to compensate ***Complainants*** for the injury sustained as a result of violations of the Act. And the D.C. Circuit has determined that the measure of damages in a Section 208 case is the difference between the charges paid and the "just and reasonable" rate.[124] In these cases, because the charge was unlawful, the just and reasonable rate was zero. Thus, the Complainants are entitled to damages based on the amount of EUCL charges actually assessed and paid during the relevant time period.

43. Defendants ignore the statutory damages provision and, in essence, seek to substitute in its place a requirement that Complainants seek recovery via an action for restitution. Defendants base their position on a Restatement provision which provides that :

> A transfer or taking of property, in compliance with/or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution to the extent necessary to avoid unjust enrichment.[125]

This provision, however, merely reflects the fact that injured parties, in certain circumstances, have

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119 *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1129 (1996), *quoting* 47 U.S.C. § 206 (emphasis added).

120 47 U.S.C. § 209.

121 *See* ¶ 33, *supra*.

122 1 Dan B. Dobbs, *Law of Remedies* § 4.1(1), at 555 (2d ed. 1993).

123 *See id.*

124 *See MCI*, 59 F. 3d at 1415.

125 Restatement (Third) of Restitution and Unjust Enrichment § 17.

an independent ground for recovery in restitution.[126] The D.C. Circuit has squarely held, however, that where, as here, a statutory mechanism exists, an equitable action in restitution is ***not*** appropriate.[127]Complainants here brought their claim for damages under Section 206, and nothing in the Restatement – or any other authority cited by Defendants – vitiates Complainants' right to invoke the statutory damages remedy.

44. The cases relied on by Defendants do not support their view that restitution is the sole remedy available to Complainants here. Defendants rely on *Atlantic Coast Line Railroad Co. v. Florida*, 295 U.S. 301 (1993), for the proposition that equitable restitution is the only available remedy for Complainants here. Defendants claim that "the statute at issue there – the Interstate Commerce Act ("ICA") – was functionally identical to the Communications Act in the remedies it provided."[128] The plaintiffs in *Atlantic Coast Line*, however, did not file a complaint against the defendants pursuant to the ICA, but rather brought a common-law action for restitution. Thus, the court in *Atlantic Coast Line* did not interpret or apply the provisions of the ICA that were "functionally identical" to Sections 206-209 of the Act, but applied principles of restitution. Indeed, the Court emphasized that the ICC lacked authority in that instance to give reparations or damages.[129] Nothing in this or any other case cited by Defendants stands for the proposition that Complainants are relegated to restitution when a statutory right to damages exists.

45. Similarly, *Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz*, 584 F.2d 12 (3d Cir. 1978), *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975), and *Texas Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867 (1st Cir. 1995), relied on by Defendants, involved ***no*** statutory provision conferring the right to recover damages comparable to Sections 206 and 209 of the Act. Lacking such a statutory basis, these cases involved an analysis of equitable restitution.[130] In sum, the cases have no relation to the claim brought by the Complainants here, and by no means provide a basis to read into Section 206 a requirement that damages be limited to restitution in this or any other situation.

C. Even Under Principles of Restitution, Defendants Would Be Liable for Unlawfully Assessed EUCL Charges

46. Analyzing Complainants' causes of action under principles of restitution, in any event, would result in an award of damages to Complainants. "[T]he fundamental characteristic of unjust enrichment is 'that defendant has been unjustly enriched ***by receiving something . . . that properly***

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126 *See Restatement (Third) of Restitution and Unjust Enrichment* § 1 cmt. H (Discussion Draft 2000) ("restitution . . . is itself a source of obligations, analogous in this respect to tort or contract. A liability in restitution is enforced by restitution's own characteristic remedies, just as a liability in contract is enforced by what we think of as contract remedies.")

127 *See U.S. v. Associated Transport, Inc.*, 505 F.2d 366, 367-69 (D.C. Cir. 1995).

128 Complainants' Consolidated Reply at III-9.

129 *Atlantic Coast Line,* 295 U.S. at 312.

130 Similarly, *Towns of Concord, Norwood and Wellesley, Massachusetts v. FERC*, 955 F.2d 67 (D.C. Cir 1991), another case relied on by Defendants, does not involve a statutory right to damages, but rather merely confirms that FERC has discretion in ordering rate refunds under the Federal Power Act.

belongs to the plaintiff."[131] Such a determination is made as between the two parties involved:

> [U]njust enrichment refers to corrective justice . . . It does not invite judgments about the fair distribution of wealth in society, but about what is right between two particular people. . .[132]

47. The Defendants assert that, if they had not assessed the EUCL charges on the IPPs, they could have assessed higher CCL charges on the interexchange carriers ("IXCs"). Thus, according to Defendants, they were not enriched.[133] Defendants, in fact, were enriched because they unlawfully assessed and collected payments from the Complainants.[134] And the enrichment was unjust because the assessments and collections violated Section 201(b) and the Commission's access charge requirements. Section 201(b) requires "all charges" of a communications carrier to be just and reasonable.[135] The carrier "having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . shoulder the hazards incident to its actions including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."[136] Every customer has the right to be charged lawful rates, and this right is not conditioned upon the rates other ratepayers may be charged for other services. Defendants thus may not justify unlawful charges to the Complainants by asserting that they had failed to assess the maximum lawful CCL charge on the IXCs. Requiring the Defendants to pay damages thus would be consistent with equitable restitution principles because it merely would require the carriers "to give up what they never should have collected."[137]

V. COMPLAINANTS' RECOVERY PERIOD IS LIMITED TO TWO YEARS PRIOR TO THE FILING OF THEIR INFORMAL COMPLAINTS

48. Section 415 of the Act requires an action for damages to be filed within two years of the time a cause of action accrues. Thus, damages are available only for the two-year period preceding the filing of a complaint. In these cases, informal complaints were filed in the late 1997/early 1998 time frame.[138] Complainants, nevertheless, seek to recover EUCL payments from Defendants for

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131 *Rapaport v. United States Dep't of the Treasury, Office of Thrift Supervision,* 59 F.3d 212, 217 (D.C. Cir. 1995) (emphasis added), quoting Dobbs, *Law of Remedies* § 4.1(2); *see also Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 786 (8th Cir. 1996) ("a party is unjustly enriched when he has received something of value that belongs to another").

132 Dobbs, *Law of Remedies* § 4.1(2), at 558; *see also MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998) (unjust enrichment exists when "as between the two parties enrichment of the [defendant is] unjust.")

133 Citizens Supplemental Answer at III-16; Qwest Supplemental Answer at III-26; Verizon New England Supplemental Answer at B-15; ALLTEL Supplemental Answer at IV-6; SBC Supplemental Answer at III-16; BellSouth Supplemental Answer at II-15; Century Supplemental Answer at IV-6; TDS Supplemental Answer at 15; Verizon North Supplemental Answer at B-15; Verizon Delaware Supplemental Answer at B-15.

134 Proof of such payment will occur in the second phase of this proceeding.

135 47 U.S.C. § 201(b).

136 *FPC v. Tennessee* Gas *Transmission Co.*, 371 U.S. 145, 152-53 (1962); *see also Liability Order*, 15 FCC Rcd at 8770, ¶ 31.

137 *New England Telephone & Telegraph Co v. FCC.*, 826 F.2d 1101, 1108 (D.C. Cir. 1987).

138 *See* CVCA v. Citizens Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by CVCA against Citizens, dated Mar. 3, 1998); CVCA v. Qwest Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by CVCA against Qwest, dated Sep. 29, 1997); IMR v. Verizon New England Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by IMR

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the entire period during which Defendants assessed the EUCL on each Complainant.[139] Complainants make two types of arguments to support their claims. First, Complainants make various assertions about why the Commission should deem the cause of action to have accrued either when the D.C. Circuit issued the *C.F. Communications* Order, or when the Commission issued the *Liability Order* in 2000. Complainants claim that it would have been futile for them to have pursued their claims prior to the issuance of these orders, in light of the Commission's prior rulings to the contrary, even though other complainants with identical claims were continuously appealing the Commission's determinations.[140] As additional support for their contentions, Complainants cite to various cases to assert that subsequent favorable precedent can revive a time-barred claim.[141] As discussed below, we find, however, that the causes of action accrued when the EUCL charges were imposed.

49. Second, Complainants assert that, irrespective of the accrual date of their causes of action, the statute of limitations should be tolled on equitable and administrative grounds, based on the filing of a petition for declaratory ruling by a payphone trade association (APCC) and the voluminous number of informal complaints. Complainants seek a waiver, under Section 1.3 of our Rules, of the application of Section 415(b) of the Act, which provides a party with two years from the date the cause of action accrues to file a complaint.[142] Based on Commission and court precedent, as well as the facts of this case, as discussed below, we decline to extend the recovery period for which Complainants may collect damages beyond the limitations period set out in Section 415(b) of the Act.

A. Complainants' Causes of Action Accrued at the Time That The EUCL Charges Were Assessed

50. The purpose of Section 415 is "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed."[143] Thus, we review Complainants' assertions from the perspective that: 1) Complainants

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against Verizon, dated Oct. 6, 1997); ITC v. ALLTEL Complaint at I-4, ¶1; Exh. 1 (Informal Complaint filed by ITC against ALLTEL, dated Sep. 15, 1997); ITC v. Ameritech Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by ITC against. Ameritech, dated Sep. 15, 1997); ITC v. BellSouth Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by ITC against BellSouth, dated Sep. 15, 1997); ITC v. Century Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by ITC against Century, dated Sep. 15, 1997); ITC v. TDS Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by ITC against TDS, dated Sep. 15, 1997); ITC v. Verizon North Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by ITC against Verizon North, dated Sep. 15, 1997); NTC v. Verizon Delaware Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by NTC against Verizon Delawere, dated Nov. 4, 1997); NSC v. PacBell Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by NSC against PacBell, dated Dec. 31, 1997); Payphone Systems v. Citizens Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by Payphone Systems against Citizens, dated Jan. 8, 1998); Payphone Systems v. PacBell Complaint at I-4, ¶ 1; Exh. 1 (Informal Complaint filed by Payphone Systems against PacBell, dated Jan. 8, 1998).

139 As noted earlier, this time frame encompasses the years 1986 through 1997. *See supra* ¶ 3.

140 We note that many of the complainants who chose to file complaints earlier were represented by the same Washington D.C. communications counsel representing the Complainants in this matter.

141 *See* Complainants' Legal Analysis at II-44 – II-52, ¶¶ 74 – 88.

142 47 U.S.C. § 415(b).

143 *Bunker Ramo Corp*., 31 FCC 2d 449, 453, ¶ 12 (1971) ("*Bunker Ramo*"). *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974) (stating that "statutory limitation periods are designed to promote justice by (continued....)

have an affirmative obligation to "exercise due diligence in preserving [their] legal rights";[144] and 2) the Commission and the federal courts strictly construe Section 415 and exceptions to its application have been confined to narrow circumstances, such as fraudulent concealment.[145] Based on the circumstances of this case, we find that Complainants did not make sufficient efforts to pursue their claims, nor have they provided any other basis for determining that the cause of action accrued later than the time the EUCL charges were assessed.

51. Under Section 415(b), a cause of action accrues at the date of the injury, if it is readily discoverable.[146] If the injury is not readily discoverable, the cause of action accrues when the litigant discovers the injury.[147] In these cases, all of the Complainants have provided affidavits stating that they were aware of the EUCL charge and that they believed these charges were unlawful from the start.[148] Thus, the injury in these complaints was not only "readily discoverable," but in

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preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."). *See* also *Aetna Life Ins. Co. v. AT&T Co*., 3 FCC Rcd 2126, 2129, ¶ 13 (CCB 1988) ("*Aetna*"), *aff'd sub nom. US Sprint Communications Co. v. AT&T Co.*, 9 FCC Rcd 4801 (1994) ("*US Sprint*"), *aff'd, Sprint Communications Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996*) ("Sprint"); Carter v. Washington Metropolitan Area Transit Authority*, 764 F.2d 854, 858 (D.C. Cir. 1985) ("*Carter*").

144 *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1991*). See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (stating "one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *I.M. Frazer v. United States*, 288 F.3d 1347, 1352 (Fed. Cir. 2002) (stating that the court has "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *see also Aetna*, 3 FCC Rcd at 2129, ¶ 14; *Armstrong Utils., Inc. v. General Tel. Co.*, Memorandum Opinion and Order, 25 FCC 2d 385, 389, ¶ 12 (1970) ("*Armstrong*").

145 *Armstrong*, 25 FCC 2d at 389, ¶ 11 (stating that the "construction of Section 415, both by the Commission and the federal courts, has been 'strict'"; *Carter*, 764 F.2d at 858 (noting that the general rule is that courts should apply the statute of limitations strictly); *Bunker Ramo,* 31 FCC 2d at 453, ¶ 12 (stating that "although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so."). *See also US Sprint*, 9 FCC Rcd at 4802, ¶ 10; *Teleprompter Cable Sys., Inc*., Decision, 52 FCC 2d 1263, 1271, ¶ 19 n.13 (1975*), rev'd and remanded on other grounds, Teleprompter Cable Sys., Inc. v. FCC*, 543 F.2d 1379 (D.C. Cir. 1976*)*; *Municipality of Anchorage d/b/a Anchorage Telephone Utility v. Alascom, Inc.*, 4 FCC Rcd 2472, 2473, ¶23 (CCB 1989) ("*Anchorage*"). Complainants, however, make no allegations of fraudulent conduct by the Defendants in their complaints.

146 *See Sprint*, 76 F.3d at 1225 (stating that a cause of action accrues and the limitations period begins to run only when the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action.); *AirTouch Cellular v. Pacific Bell*, Memorandum Opinion and Order, 16 FCC Rcd 13502, 13504, ¶ 6 (2001) ("*AirTouch*") (stating that, under Section 415(b), a cause of action accrues "when the carrier does the unlawful act or fails to do what the law requires."). *See also Liability Order*, 15 FCC Rcd at 8772, ¶ 36; *C.F. Communications Corp. v. Century Tel. of Wisconsin, Inc.*, Hearing Designation Order, 16 FCC Rcd 8801, 8807, ¶ 17 (2001) ("*HDO*"); *MCI Telecommunications Corp. v. Teleconcepts*, 71 F.3d 1086, 1100 (3rd Cir. 1995) ("*Teleconcepts*").

147 *See Sprint*, 76 F.3d at 1226 (stating that "where the defendant fraudulently concealed material facts related to its wrongdoing," the cause of action does not accrue until the plaintiff has "something approaching actual notice."). *Aetna*, 3 FCC Rcd at 2129, ¶ 16 (noting that the "running of a limitations period may be tolled by active concealment of the facts giving rise to a cause of action by defendant."). *See also Valenti v. AT&T Co*., Memorandum Opinion and Order, 12 FCC Rcd 2611, 2621, ¶ 24 (1997) ("*Valenti*").

148 *See* Complainants' Legal Analysis at II-30, ¶ 54. *See e.g.* CVCA v. Citizens Complaint; Exh. 8 (Affidavit of James Patrick Kerivan, Jr. On the Recovery Period ["Kerivan Recovery Period Aff."] at 2-4, ¶¶ 6, 9, 13; IMR v. Verizon New England Complaint; Exh. 8 (Affidavit of Thomas J. Biggins On the Recovery Period ["Biggins Recovery Period Aff."]) at 2, ¶¶ 5-8; ITC v. ALLTEL Complaint; Exh. 8 (Affidavit of William J. Nelson On the Recovery Period ["Nelson Recovery Period Aff."] at 2-3, ¶¶ 6, 8-9; NTC v. Verizon Delaware Complaint; Exh. 8 (Affidavit of Michael Bright On the Recovery Period ["Bright Recovery Period Aff."] at 2-3, ¶¶ 5-7; NSC v. PacBell Complaint; Exh. D
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fact had been discovered from the time Complainants received their first bill containing the EUCL assessment.[149] Indeed, Complainants also state that they were aware of the formal complaints filed by the other IPPs.[150] Moreover, Complainants' participation in the APCC petition for declaratory ruling seeking to overturn the EUCL's application on them further belies their argument that they were not aware they had a cause of action until the issuance of the D.C. Circuit's *C.F. Communications* decision.[151] Hence, we reject the claim that their causes of action accrued no earlier than October 31, 1997, the date of the *C.F. Communications* decision or the Commission's *Liability Order* of 2000.[152]

52. We do not find Complainants' arguments about the futility of previously pursuing their claims to be an adequate basis for tolling the requirements of Section 415(b), or finding that the cause of action accrued at a time other than the date of injury. Complainants argue that adverse Commission and judicial rulings prior to the Court's issuance of the *C.F. Communications* decision deprived them of "any practicable" opportunity to pursue their claims.[153] The facts of this case indicate otherwise.

53. Between 1984 and 1988, there was no statement from the Commission about the validity of the charges, and thus, no arguably adverse ruling that could have prevented Complainants from filing complaints. Under the Commission's rules, the two unpublished letters by an individual FCC staff member in response to informal complaints issued in 1988 and 1989[154] could not be used as precedent against other complainants.[155] Moreover, when the full Commission spoke to the validity of the charges in 1995,[156] that decision did not become final. Indeed, that

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(Affidavit of M. Sean Venezia ["Venezia Aff."] at 25, ¶¶ 67-69; Payphone Systems v. Citizens Complaint; Exh. 8 (Affidavit of Ronald McPherson On the Recovery Period ["McPherson Recovery Period Aff."] at 2, ¶¶ 4, 6-8.

149 *MCI Telecommunications Corp. v. U S West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 9328, 9330, ¶ 5 (2000) (noting that "the general rule is that the two-year limitations period begins to run when the customer receives a bill from the carrier assessing the disputed rate"). *See also Teleconcepts*, 71 F.3d at 1100; *Tele-Valuation, Inc. v. AT&T Co.*, 73 FCC 2d 450, 452, ¶ 4 (1979).

150 *See* CVCA v. Citizens Complaint at I-35, ¶¶ 6-7. *See also* Kerivan Recovery Period Aff. at 4, ¶ 17; Biggins Recovery Period Aff. at 4, ¶ 19; Nelson Recovery Period Aff. at 4, ¶ 17; Bright Recovery Period Aff. at 4, ¶ 17; Venezia Aff. at 27, ¶ 76; McPherson Recovery Period Aff. at 3, ¶ 15.

151 *See* CVCA v. Citizens Complaint at I-35, ¶¶ 1-5; *See also* Kerivan Recovery Period Aff. at 3-4, ¶¶ 13-14; Biggins Recovery Period Aff. at 3, ¶ 11; 4, ¶¶ 16-18; Nelson Recovery Period Aff. at 2, ¶ 7; Bright Recovery Period Aff. 2, ¶ 6; 4, ¶¶ 12-14; Venezia Aff. at 26, ¶¶ 73-74; McPherson Recovery Period Aff. at 2, ¶ 5; 3, ¶ 12.

In this regard, given the uncertain outcome of their petition and the agency's discretion whether to rule on a petition for declaratory ruling, Complainants should not have relied solely on this petition to address their legal claims against Defendants. *See* 47 C.F.R. § 1.2; 5 U.S.C. § 554.

152 *See* Complainants' Legal Analysis at II-30, ¶ 53; II-37, ¶ 64; II-41, ¶ 69; II-49, ¶ 82; II-50, ¶ 84.

153 *Id.* at II-28, ¶ 52; II-29, ¶ 53; II-34, P 59; II-37, ¶ 64; II-41, ¶ 70; II-43, ¶ 73.

154 Sep. 14, 1988 Anita J. Thomas Letter. *See also* Apr. 4, 1989 Anita J. Thomas Letter; *Bureau CFC Order*, 8 FCC Rcd at 7336, ¶¶ 12-13.

155 *See* 47 C.F.R. § 0.445(e); Section 0.445(e) of the Commission's rule provides that an unpublished order may not be used as precedent against a third party. *See also Malkan*, 935 F.2d at 1319 (stating that staff level letters do not necessarily speak for or bind the Commission); *Liability Order*, 15 FCC Rcd at 8768-8769, ¶ 28.

156 *CFC I Order*, 10 FCC Rcd at 9778-79, ¶ 16; 9780, ¶ 21,

decision was remanded to the Commission after being successfully appealed by the affected complainants.[157] Thus, the Commission's decision upholding Defendants' manner of assessing the EUCL was subject to judicial review and pending legal challenges to that decision made the legality of Defendants' behavior uncertain.[158] Complainants themselves stated in seeking to refute Defendants' reliance argument that "[a]ny purported reliance on Commission letters or decision still under appeal would have been unreasonable as a matter of law."[159]

54. Complainants also argue that they could not have feasibly pursued their claims in other forums because district courts would have referred them to the Commission, as the Court did with the *C.F. Communications* case.[160] We disagree. Because the Commission had not issued a final determination on the legality of the EUCL assessment on IPPs, Complainants could have pursued their claims in either forum, irrespective of whether the district court would have referred the IPPs' claims to the Commission.[161] In any case, the fact that approximately 30 similarly-situated IPPs did manage to pursue over 50 claims in a timely manner and prevailed on this issue of liability puts Complainants' impossibility argument to rest.[162]

55. We are not persuaded that we should conclude in this instance that the accrual date is other than the date the injury was first discovered, i.e. the date when the IPPs received their first EUCL bills.[163] New favorable precedent does not revive a time-barred claim.[164] As appellate courts have held, the "application of the statute of limitations cannot be made to depend upon the constantly shifting state of the law"[165] because such "delayed accrual could result in an outpouring of stale, difficult to defend claims, contrary to the policy underlying limitations statutes."[166] Complainants could have filed their complaints on a timely basis and sought to have the Commission override its previous views.

56. Complainants' reliance on the *Container Corp.,*[167] *Hartford Life*,[168] *Red Chevrolet*,[169]

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157 *C.F. Communications*, 128 F.3d at 739-40.

158 *See Verizon*, 269 F.3d at 1111.

159 *See* Complainants' Legal Analysis at II-20, ¶ 36.

160 *Id.* at II-29, ¶ 51; II-35, ¶ 61.

161 We note that there is no evidence that any of these IPPs tried to pursue their claims in district court.

162 We note that the majority of these 30 prevailing IPPs were represented by the same Washington D.C. communications counsel that represent the current complainants.

163 *See Sprint*, 76 F.3d at 1226. *See also* Kerivan Recovery Period Aff. at 2-4, ¶¶ 6, 9, 13; Biggins Recovery Period Aff. at 2, ¶¶ 5-7; Nelson Recovery Period Aff. at 2-3, ¶¶ 6, 8-9; Bright Recovery Period Aff. at 2-3, ¶¶ 5-7; Venezia Aff. at 25, ¶¶ 67-69; McPherson Recovery Period Aff."] at 2, ¶¶ 4, 6-8.

164 *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) ("A decision recognizing a cause of action after the period has run does not retroactively interrupt the running of the limitations period.") ("*McConnell*"). *See also Fiesel v. Board of Ed. of City of New York*, 675 F.2d 522, 524 (2nd Cir. 1982) ("*Fiesel*"); *Duchesne v. Sugarman*, 459 F.Supp. 313 (S.D.N.Y. 1978).

165 *Fiesel*, 675 F.2d at 524.

166 *McConnell*, 661 F.2d at 118.

167 *Container Corp. of America v. Admiral Merchants Motor Freight, Inc.,* 489 F.2d 825, 828 (7th Cir. 1973) (Interpreting a provision of the Interstate Commerce Act ("ICC"), wherein the limitations period begins to run from the *issuance of an ICC order*, to find that a cause of action to enforce an ICC order accrues when a final order is issued.)

Neely,[170] and *Slaaten*[171] decisions is misplaced because they all involve circumstances in which the newly issued decision created a new cause of action or revealed the existence of a cause of action for the first time.[172] Complainants, however, believed that Defendants' EUCL assessments were inconsistent with the Commission's rules at the time of their first bills; the *C.F. Communications* decision did not create Complainants' cause of action, or put them on notice that they had a claim. *Western Union*[173] is also inapposite because the finding there that a cause of action would have accrued on the date of the Commission order setting certain final rates was based on the fact that the rates at issue were "interim prescribed rates which the Commission later found to be inadequate" and that the facts upon which the complaint was based were "inherently unknowable by potential complainants until the Commission issued its decision."[174]

57. Similarly, *ITT World Communications*[175] is not persuasive because this proceeding is not Complainants' first and only opportunity to obtain the requested relief. Like a number of other IPP complainants, they could have filed a complaint at the time they discovered the EUCL charge on their bill, either at the Commission or in federal district court, to pursue their legal remedies.[176] In addition, because the Commission's EUCL rules were imposed on Complainants starting in 1984 and Complainants were aware that Defendants were violating Section 69.104(a) from the first assessment of the EUCL charge upon them, Complainants' reliance on *AirTouch* is misplaced.[177] Moreover, under the reasoning put forth by Complainants, the *C.F. Communications* complaint would have been dismissed as prematurely filed. Thus, we conclude that the cause of action in this proceeding accrued when Defendants assessed the EUCL charge upon Complainants.[178]

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168 *Hartford Life Insurance Co. v. Title Guarantee Co.,* 52 F.2d 1170, 1174 (D.C. Cir. 1975) (finding that plaintiff's cause of action for failure of consideration depended upon a prior adjudication finding that the loan held by plaintiff was invalid).

169 *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972) (finding that plaintiff had been "without a right" until Supreme Court issued its opinion).

170 *Neely v. United States*, 546 F.2d 1059, 1068 (3rd Cir. 1976) (finding that the existence of a cause of action was "inherently unknowable" until Supreme Court issued its opinion).

171 *Slaaten v. United States*, 990 F.2d 1038, 1042 (8th Cir. 1993) (finding that plaintiff could not have had the requisite knowledge of injury to file a claim under the Federal Tort Claims Act until the Interior Board of Land Appeals issued a final decision regarding a related issue).

172 *See Aetna*, 3 FCC Rcd at 2129, ¶ 15 (rejecting complainants' reliance on *Red Chevrolet* (457 F.2d 1353) and *Neely* (546 F.2d 1059) because the challenged order at issue did not create their cause of action).

173 *Interconnection Arrangements Between and Among the Domestic and International Record Carriers*, Memorandum Opinion and Order, CC Docket Nos. 78-122 & 78-97, FCC 86-190, (rel. May 2, 1986) at ¶ 16.

174 *Id*.

175 *ITT World Communications, Inc. v. Western Union Telegraph Co*., 598 F. Supp. 1439, 1440-1 (S.D.N.Y. 1984) (holding that request made to District Court for attorney's fees as damages under Section 207 of the Act was not barred by Section 415(b) because this was plaintiff's "first and only opportunity" to recover attorney's fees in the proceeding).

176 Had such complaint been rejected by the Commission, Complainants would have been free to appeal the Commission's rulings. Also, if the Commission improperly failed to act on such complaints, Complainants could have sought mandamus.

177 *AirTouch*, 16 FCC Rcd at 13504, ¶ 6 n.21 (stating that a cause of action accrues when a rule imposing a new regulatory obligation is promulgated).

178 *See supra* n.146.

B. Complainants Have Not Demonstrated that the Statute of Limitations Should Be Tolled on Equitable or Administrative Grounds

58. We also reject Complainants' argument that, regardless of the accrual date of their causes of action, the statute of limitations should be tolled on equitable and administrative grounds by the APCC's filing of its 1989 and 1995 petitions for declaratory ruling.[179] Complainants' equitable arguments are based on a Ninth Circuit case applying California law, that enunciates a three-part test that Complainants claim the Commission should apply in this instance.[180] According to *Ervin*, a case that does not involve Section 415 of the Act, a statute of limitations can be tolled if a plaintiff has given timely notice to defendant of its claim, the delay in the filing of the claim does not prejudice the defendant, and the plaintiff has acted reasonably and in good faith.[181]

59. We find that the Commission's strict approach to the application of Section 415(b) of the Act[182] is more consistent with the United States Supreme Court's position in *Irwin*, extending equitable relief only "sparingly" where the claimant exercised "due diligence in preserving his legal rights."[183] As discussed above, it is readily apparent that Complainants did not act with anything approaching due diligence. Thus, we are not persuaded that the situation before us merits an equitable tolling of the limitations period.

60. With regard to Complainants' reliance on *Ervin*, we note, as an initial matter, that federal agencies are not required to follow state law. Thus, California law does not govern our interpretation of Section 415(b). In any case, even if we were to apply the three-part test enunciated in *Ervin*, Complainants would not prevail. First, we disagree with Complainants' position that the APCC's filing of two petitions for declaratory ruling in 1989 and 1995 constitute timely notice of their current claims, filed under Section 208 of the Act.[184] The individual Defendants in these cases could not have reasonably assumed, based on the APCC petition for declaratory ruling, that they would have been sued by these particular Complainants, or that they would be liable for damages. Second, given that Defendants would not have known to preserve the relevant records related to the informal complaints before us prior to the filing of the informal complaints by Complainants, extending the recovery period as Complainants advocate would prejudice Defendants.[185] Lastly, as we have previously stated, we find Complainants' failure to file complaints, in light of the fact that a number of other IPPs preserved their rights to damages through the appropriate procedures set out in our rules, to be unreasonable.[186] Indeed, in light of the overlap of counsel, it borders on the

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179 *See* Complainants' Legal Analysis at II-52 – II-55, ¶¶ 90 - 99.

180 *Id.* at II-52, ¶ 90, *citing Ervin v. County of Los Angeles,* 848 F.2d 1018 (9th Cir. 1988) ("*Ervin*").

181 *Ervin,* 848 F.2d at 1019. *See also Hernandez v. City of El Monte*, 138 F.3d 393, 401-402 (9th Cir. 1998); *Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993); *Daviton v. Columbia/HCA Healthcare Corp*., 241 F.3d 1131, 1137, 1140 (9th Cir. 2001) (all applying the California test for equitable tolling).

182 *See supra* n.145.

183 *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1991) (Limits tolling to instances "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.").

184 *See* Complainants' Legal Analysis at II-53 – II-54, ¶¶ 91 –93.

185 *Id.* at II-55, ¶ 94.

186 *Id.* at II-55, ¶ 95 relying on *Valenti* (12 FCC Rcd at 2211, ¶ 26) and *Teleprompter* (52 FCC 2d 1263, 1271, ¶ 19 n.13) for the proposition that the Commission has previously applied the *Ervin* test. We note, however, that in *Valenti*, (continued....)

incomprehensible. As the *C.F. Communications* case demonstrates, filing protective complaints was not an exercise in futility.

61. We also note that the decisions that Complainants cite as examples of the Commission's tolling the limitations period, based on Section 1.3 of our Rules, are not on point. Those cases involved waivers of the six-month conversion deadline in Section 1.718 of our Rules where informal complaints were already filed, rather than a tolling of the statutory limitations period.[187]

62. We also reject Complainants' assertion that we should toll the statute of limitations, based on the APCC filing or the filing of other IPP complaints, for reasons of adjudicatory efficiency. Complainants argue that the filing of a large number of formal or informal complaints might have been administratively burdensome for the Commission.[188] We note that Complainants did not contemporaneously approach the Commission for guidance on how to handle numerous complaints. Thus, we are not persuaded by their argument ***after the fact*** that they need not have filed complaints sooner because of their concern for our administrative burden.

63. Although there is expense and effort of litigating claims in light of adverse precedent, they do not "provide a basis for suspending the statute of limitations period. The only sure way to determine whether a suit can be maintained is to try it."[189] We see no reason in this instance to depart from our precedent limiting the doctrine of equitable tolling.[190]

64. We, therefore, agree with Defendants that Section 415 limits Complainants' claims for recovery to those charges levied no earlier than two years prior to the date Complainants filed their informal complaints.[191] Because the charges at issue ceased on April 15, 1997, we can only award damages where informal complaints were filed by April 15, 1999.

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the Commission relied on prior Commission decisions (*Armstrong,* 25 FCC 2d at 389, and *Anchorage*, 4 FCC Rcd at 2476), to reject the equitable tolling request. It was only to address complainant's reliance on *Ervin* that the Commission noted that the complainant failed the third prong of the *Ervin* test because complainant should have been aware that the Commission had primary or exclusive jurisdiction. Contrary to Complainants' assertions, the Commission's *Teleprompter* decision does not apply the California *Ervin* test to consider whether the statute of limitations should be equitably tolled. *Teleprompter*, 52 FCC 2d 1263, 1271, ¶ 19 n.13.

187 *See* Complainants' Legal Analysis at II-39 *citing First Waiver Order*; *Bay Communications v. New England Tel. Co*., Order, 7 FCC Rcd 254 (CCB 1992) (unopposed waiver requests granted because of pending related complaint); *TTX Co. v. AT&T Communications*, Order, 7 FCC Rcd 2084 (CCB 1992) (unopposed waiver request granted for 60 days because deadline for filing formal complaint expired during Commission's consideration of waiver request).

188 *Id.* at II-56 – II-57, ¶¶ 97-99.

189 *Fiesel*, 675 F.2d at 524 (stating that it is incumbent upon a plaintiff to test his "right and remedy in the available forums. These suits were not commenced until through the labor of others the way was made clear.")

190 *See supra* n.144 and n.145. *See also Armstrong*, 25 FCC 2d at 389, ¶ 12 (stating that permitting "a potential complainant to sit idly by and remain silent for years" and "then claim that a cause of action has accrued to him because of a determination made by the Commission in an adjudicatory proceeding involving a different entity asserting an independent grievance" would be "contrary to the policies underlying the statute of limitations").

191 *See* Citizens Supplemental Answer at 33-53; Qwest Supplemental Answer at III-32 – III-55; Verizon New England Supplemental Answer at B-28 – B-52; ALLTEL Supplemental Answer at IV-7 – IV-9; SBC Supplemental Answer at III-33 – III-52; BellSouth Supplemental Answer at II-30 – II-55; Century Supplemental Answer at IV-7 – IV-9; TDS Supplemental Answer at 30 - 53; Verizon North Supplemental Answer at B-28 – B-52; Verizon Delaware Supplemental Answer at B-30 – B-53.

VI. COMPLAINANTS HAVE ESTABLISHED THAT THE INFORMAL COMPLAINTS UNDERLYING THESE FORMAL COMPLAINTS WERE TIMELY FILED

65. We reject Defendants' arguments disputing the filing of certain informal complaints that underlie some of the formal complaints at issue here. Defendants urge the Commission to dismiss formal complaints for which a complainant cannot provide what Defendants consider to be contemporaneous documentary evidence of filing its underlying informal complaint.[192] For instance, because the copies of the informal complaints submitted by ITC, NSC, and Payphone Systems lack Commission date stamps, BellSouth and SBC argue that the Complainants have not met their burden of showing that the complaints were filed.[193] Although conceding that CVC filed an informal complaint against it, Qwest disputes the date on which CVC filed the complaint because the copy in this record lacks a Commission date stamp.[194] BellSouth also contests the filing of the informal complaint against it by ITC because BellSouth's records do not reflect any receipt of this complaint.[195] In addition, BellSouth and SBC assert that the lack of a signature on the ITC complaints filed against them is further indicia of improper filing.[196]

66. There are unique circumstances surrounding the processing of the EUCL charge informal complaints that we must address here. First, our survey of the Commission's informal complaint files and electronic database indicates that, due to the administrative difficulties the Commission encountered in processing these several thousand informal complaints, some informal complaints do not bear a date stamp. In other cases, it is evident that the date stamp was not affixed by the staff contemporaneously with the receipt of the informal complaint. In addition, we have determined that certain complaint files were prematurely closed and discarded as a result of difficulties experienced during a database conversion, even though the complaints had not been resolved.[197] Thus, a properly filed complaint may not appear in the database or the Commission's files. We also have concerns that, in some instances, the filing date noted in the database was not the actual date of receipt. We must take these circumstances into account in assessing Defendants' arguments.

67. In light of the Commission's rules, all the circumstances, and the totality of the

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192 SBC Supplemental Answer at 56, 59-61; BellSouth Supplemental Answer at II-57, 59-60; Qwest Supplemental Answer at III-56-57; TDS Supplemental Answer at III-55, 58. Although TDS acknowledges that the informal complaint filed against it by ITS appears to be timely filed, TDS also argues that the Commission should dismiss any formal complaints for which a complainant has failed to show that it properly filed an informal complaint. *See* TDS Supplemental Answer at n.38.

193 BellSouth Answer at I-30, ¶ G12; SBC Answer, I-H at 27, 30, 32. Relying on the same theory, SBC also appears to be contesting the dates on which the informal complaints at issue were filed.

194 Qwest Answer at I-31, ¶ 14; Qwest Supplemental Answer at III-54 – III-57 (Qwest does not dispute that CVC filed an informal complaint, but maintains that the correct filing date for CVC's informal complaint is April 15, 1998, instead of October 3, 1997).

195 BellSouth Supplemental Answer at II-60, n.39.

196 BellSouth Answer at I-30, ¶ G12; SBC Answer at I-H at 27, 30, 32.

197 *See* ITC v. BellSouth Complaint, Exh. 24 *(*Letter from Chief, Consumer Protection Branch, Federal Communications Commission, dated June 30, 1999, to ITC Corporation (stating that, during implementation of new complaint processing system, "unexpected technical issues arose and as a result, we have been unable to further process your complaint and have closed the file.") ("June 30, 1999 Consumer Protection Branch Letter").

information before us, we find that the copies of the informal complaints in this record constitute contemporaneous documentary evidence of filing.[198] Consequently, we conclude that the informal complaints at issue here were properly filed on the dates noted below.

68. As a preliminary matter, we dispense with the lack of signature issue for the ITC complaints. We note that our rules regarding informal complaints do not require that an informal complaint include a signature.[199] Moreover, the Commission's copies of the informal complaints submitted by ITC also lack signatures, so the fact that Complainants' copies are not signed does not detract from their probative value.[200]

69. As to the complaints that lack date stamps, we recognize that the lack of a date stamp is significant, but nevertheless conclude that the lack of a date stamp alone should not bar a complainant from pursuing its claim in these specific circumstances. The Commission has previously required the submission of date stamped copies as authoritative proof of filing,[201] but we note that those cases involved more formal filings and instances where the Commission had no record of initially receiving the filing in question.[202] In these unique circumstances, where some properly-filed complaints were not properly date-stamped by Commission staff, we find that we must consider all probative evidence. On this record, we conclude that evidence of Complainants' standard mailing practices[203] and the date on the contested informal complaint are additional

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198 *TeleSTAR, Inc*., Decision, 2 FCC Rcd 5, 13, ¶ 23 (Rev. Bd. 1987) (stating that credibility involves the manner in which testimony "hangs together with other evidence," *citing* to *Carbo v. U.S*., 314 F.2d 718, 749 (9th Cir. 1963)); *American International Development, Inc*., Memorandum Opinion and Order, 86 FCC 2d 808, 815, ¶ 17 (1981) (noting that the existence of corroborative evidence is a factor to be considered in weighing the evidence presented). *See also Contemporary Media, Inc.*, Decision, 13 FCC Rcd 14,437, 14,457, ¶ 39 (1998).

199 *See* 47 C.F.R. §§ 1.716, 1.717, and 1.718.

200 The informal complaint letters are dated September 15, 1997, are printed on ITC's stationery, and include the name of ITC's president, William J. Nelson. We find credible the affidavit of Pamela S. Wickham, ITC's office manager during the time period at issue, that it was the company's customary practice to send letters out on the date they were generated, without Mr. Nelson's signature when he was not available to sign them, and that this is what occurred with the informal complaints at issue here. Complainants' Consolidated Reply at III-154, ¶ 104; Exh. 30 (Declaration of Pamela S. Wickham) ("Wickham Decl."), at 2-3, ¶¶ 2-8.

201 *See Hughes-Moore Assocs*., Memorandum Opinion and Order, 7 FCC Rcd 1454, 1455, ¶¶ 10-11 (1992) (finding that, in the absence of a document with an actual FCC date stamp, and where neither the Commission nor the parties have a record of initially receiving the pleading in question, the submitted copy was not entitled to be accepted at face value; in addition, verified statement of counsel regarding proper mailing, without additional corroborating evidence, was insufficient); *Westchester Council for Public Broadcasting, Inc. to Share Time with Noncommercial Educational Station WNYE(FM), Brooklyn, New York*, Memorandum Opinion and Order, 8 FCC Rcd 2213, 2214, ¶ 7 n.4 (1993) (finding that applicant's copy of its response without a Commission date stamp constituted insufficient evidence of filing a response.); *Federal Express Corp*., Memorandum Opinion and Order, 15 FCC Rcd 4289, 4292, ¶ 13 (WTB 2000) (finding that complainant did not diligently prosecute its renewal application because, among other things, it did not avail itself of the option to receive a date stamped copy of the application to indicate the FCC's receipt of it).

202 Except for the informal complaint that ITC says it filed against BellSouth, the Commission has a record of all the informal complaints at issue in this proceeding. *See* June 29, 2001 FCC Open and Pending List of EUCL Informal Complaints.

203 *See supra* n.200 regarding Wickham Decl. We note that evidence regarding mailing is an acceptable form of proof. *See Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956, 964 (9th Cir. 2001) (stating that a sworn statement is credible evidence of mailing.); *Simpson v. Jefferson Standard Life Ins. Co*., 465 F.2d 1320, 1324 (6th Cir. 1972) (finding that evidence of compliance with business custom will suffice to establish proof of mailing.); *Legille v. Dann*, 544 F.2d 1, 4 (D.C. Cir. 1976) (noting that "proof that mail matter is properly addressed, stamped deposited in

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indicators of whether and when an informal complaint was filed. Complainants request that we establish a general presumption that an informal complaint had been timely filed based on a combination of certain documentary and testimonial evidence.[204] Because the determinations in this proceeding will serve as precedent in future matters, we do not find it necessary to establish such a presumption.

70. With regard to the specific informal complaints at issue here, we find that there is sufficient evidence in the record to conclude that the informal complaints were filed and to determine the dates of these filings. We note that not only are the ITC, NSC, and Payphone Systems complaints against SBC listed in the Commission's database as having been filed,[205] but that SBC responded to the informal complaints at issue and acknowledged that its response was based on complaints filed with the Commission.[206] We find these indicia provide a sufficient basis for concluding that the informal complaints were filed.

71. Although ITC's informal complaint against BellSouth is not in the database, we find that ITC has met its burden of showing that it is more than likely that an informal complaint against BellSouth was filed. ITC has provided evidence showing that it properly mailed several other informal complaints on the same day (September 15, 1997) and in the same package as the informal complaint against BellSouth. The other informal complaints mailed that day are in the Commission's database.[207] Thus, we find it reasonable to conclude that the ITC complaint against BellSouth was in fact filed with the Commission.[208]

72. We also conclude that there is enough evidence in the record to establish a specific date

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an appropriate receptacle has long been accepted as evidence of delivery to the adressee.") *See also Smith v. City of Chicago,* 242 F.3d 737, 741 (7th Cir. 2001).

204 Complainants' Legal Analyis at II-83 – II-84, ¶¶ 143 – 145; II-95, ¶¶ 23-24.

205 *See* June 29, 2001 FCC Open and Pending List of EUCL Informal Complaints.

206 In its Jan. 21, 1999 response to ITC's informal complaints, Ameritech (SBC) stated that it "has received a copy of your letters" to the Federal Communications Commission dated September 12, 1997…. seeking a refund of end user common line ("EUCL") charges assessed prior to April 15, 1997." *See* ITC v. Ameritech Complaint, Exh. 2 (Letter from Linda Koraba, Ameritech, dated Jan. 21, 1999, to Bill Nelson, ITC). In addition, in its Dec. 31, 1998 response to NSC's informal complaint, PacBell (SBC) stated that it had received a "copy of your letter dated Dec. 30, 1997, to the FCC." Further, PacBell (SBC) noted that it "is waiting for the expected further FCC proceedings to determine whether or not we have any obligation to refund EUCL charges to independent Payphone Service Providers." *See* NSC v. PacBell Complaint, Exh. A (Letter from June A. Burgess, Pacific Bell, dated Dec. 30, 1998, to Iain MacLeod, NSC). SBC's Jan. 4, 1989 response to Payphone Systems's informal complaint is identical in substance to its response to NSC's informal complaint. Letter from June A. Burgess, Pacific Bell, dated Jan. 4, 1999, to Ronald MacPherson, Payphone Systems.

207 *See* Complainants' Consolidated Reply at III-153, ¶ 102; 154, ¶ 104. *See also* Wickham Decl. Ms. Wickham's declaration indicates that the package included informal complaints that underlie the following six formal complaints in this proceeding: ITC v. ALLTEL; ITC v. Ameritech; ITC v. BellSouth; ITC v. Century; ITC v. TDS; and ITC v. Verizon North.

208 *See* ITC v. BellSouth Complaint, Exh. 24 (June 30, 1989 Consumer Protection Branch Letter). *See also* n.196 *supra*. We find that ITC's receipt of this letter supports ITC's assertion that the informal complaint ITC states it filed against BellSouth was prematurely closed. As with all the letters the bureau sent regarding the files that were prematurely closed during the database conversion, this letter did not state the name of the defendant or informal complaint number of the improperly closed complaint. However, this was the only informal complaint out of the six informal complaints ITC filed together that is not currently in the Commission's database.

on which each of these informal complaints was filed. Regarding the ITC complaint against BellSouth, we note that the Commission's database lists several different filing dates for the informal complaints filed against multiple Defendants, despite evidence that they were mailed on the same day, and in the same package.[209] To avoid unfairness to ITC from the Commission's administrative problems, we conclude that, in this instance where ITC has submitted evidence that it followed proper mailing procedures in filing its informal complaints, we will deem the date of mailing (September 15, 1997) to be the filing date.[210] Because ITC had mailed to the Commission its informal complaint against BellSouth in the same package as the complaints it filed against ALLTEL, Ameritech (now SBC), Century, TDS, and Verizon North, we also deem the filing date for those informal complaints to be September 15, 1997.

73. We note that there is a discrepancy between the date listed in the database (December 2, 1997) for the filing of the NSC complaint against PacBell (now SBC) and the date on the informal complaint (December 31, 1997). We ascribe this discrepancy to the administrative problems encountered in processing these complaints, as described above. In the absence of specific evidence of the date on which the NSC Complaint arrived at the Commission, we will presume that it was filed on the date indicated on the complaint, i.e., December 31, 1997. SBC also contests the dates on which ITC and Payphone Systems filed their informal complaints. As noted above, we are satisfied by the evidence ITC provided that it properly filed its informal complaint against Ameritech and deem September 15, 1997 as the filing date for this complaint. We also conclude that SBC has provided no evidence to show that the January 8, 1998, filing date claimed by Payphone Systems, and reflected in the Commission's records, is inaccurate.[211]

74. With regard to the filing date of the CVC informal complaint against Qwest, we find that the return receipt and Mr. Kerivan's testimony establish that CVC mailed the informal complaint to the Commission on September 29, 1997, and that the postal service delivered the complaint to the Commission on October 3, 1997.[212]

VII. BASED ON THE UNIQUE CIRCUMSTANCES OF THESE CASES, WE WAIVE OUR SETTLEMENT CERTIFICATION REQUIREMENT IN SECTION 1.721(A)(8) OF THE COMMISSION'S RULES.

75. Defendants assert that we should dismiss certain of Complainants' claims because Complainants did not notify Defendants in their certified settlement letters that these claims would be included in the formal complaints, as required by Section 1.721(a)(8) of the Commission's rules.[213] The specific claims that Defendants seek to have dismissed are based on (1) Section 203 of

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209 The database lists the following filing dates for ITC's informal complaints against the defendants in this proceeding: ITC v. ALLTEL: Sep. 23, 1997; ITC v. Ameritech: Oct. 1, 1997; ITC v. Century; Sep. 15, 1997; ITC v. TDS: Sep. 15, 1997; ITC v. Verizon North: Oct. 1, 1997.

210 *See* 47 C.F.R. § 1.5.

211 The database shows: 1) ITC's complaints against Ameritech were filed on Oct. 1, 1997; 2) Payphone Systems' complaint against PacBell was filed on Jan. 12, 1998.

212 Complainants' Consolidated Reply, III-153; Exh. 27 (Declaration of James P. Kerrivan, Jr.), at 2, ¶¶ 3-4.

213 Citizens Supplemental Answer at III-53 – III-54; Qwest Supplemental Answer at III-55 – III-56; Verizon New England Supplemental Answer at B-52 - B-53; ALLTEL Supplemental Answer at IV-9- IV-10; SBC Supplemental Answer at III-86; BellSouth Supplemntal Answer at II-55 to II-56; Century Supplemental Answer at IV-9 – IV-10;

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the Act, (2) the filed rate doctrine, (3) the argument that Defendants violated the Act by assessing EUCL charges on the lines used to provide both semi-public and public service, and (4) the argument that Complainants' status as carriers rather than "end users" means that Defendants could not assess EUCL charges on any lines that Complainants ordered.[214] Complainants argue that Section 1.721(a)(8) does not require a complainant to state each specific cause of action that might be included in its formal complaint, and that to do so would unreasonably expand the scope and purpose of the rule.[215]

76. While we do have concerns about whether Complainants' certified settlement letters met the requirements of Section 1.721(a)(8) of our rules, we find it appropriate in this case to waive this rule on our own motion. As explained below, we do so because it is clear that Defendants in this case had adequate notice, prior to receiving the settlement certification, of all the claims Complainants have asserted, and because there is no evidence that the parties have not attempted settlement in accordance with the Commission's rules.

77. The Commission's first objective when complaint issues arise is to promote settlement efforts to enable parties to resolve disputes on their own before resorting to adjudication.[216] To this end, the Commission's rules require that complainants and defendants certify in their respective complaints and answers that the possibility of settlement was discussed before the complaint was filed with the Commission.[217] Specifically, Section 1.721(a)(8) states that the complainant must certify that prior to the filing of the formal complaint, "the complainant mailed a certified letter outlining the allegations that form the basis of the complaint it anticipated filing with the Commission to the defendant carrier. . . ." The Commission has emphasized that this rule requires verification that the parties discussed the "facts and issues in dispute prior to the filing of the complaint."[218]

78. In order to meet the Commission's objective of promoting settlement, rule 1.721(a)(8) would generally require complainants to provide defendants with adequate notice of each of their enumerated claims.[219] We find that given the unique facts of this case, Defendants had adequate notice of the nature of the claims that Complainants were likely to assert against them even before they received the settlement letters. This notice came in several forms. First, the informal complaints against Defendants that preceded the formal complaints set out Complainants' argument that the IPPs are not "end users" under the Commission's rules, thereby implicitly including the

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Verizon North Supplemental Answer at B-51 - B-52; Verizon Delaware Supplemental Answer at B-52 - B-53; TDS Supplemental Answer at 53-54.

214 *See, e.g.*, Citizens Supplemental Answer at III-54; SBC Supplemental Answer at III- 86. As we have concluded above that we need not reach the section 203 and filed rate doctrine claims for purposes of this Order, we will not address whether Complainants provided sufficient notice about these particular claims.

215 Complainants' Consolidated Reply at III-129 - III-131.

216 *Formal Complaints Order*, 12 FCC Rcd at 22507-08, ¶ 21.

217 *Id.* at 22507, ¶ 21.

218 *Id.* at 22517, ¶ 42.

219 *See, e.g.*, *Sprint Communications Company, L.P., v. Time Warner Telecom, Inc.*, File No. EB-01-MD-020, Notice of Formal Complaint, Sept. 7, 2001, at 3.

argument that they are not subject to EUCL charges for any of their payphones.[220]

79. Second, in 2001, the Enforcement Bureau initiated a hearing proceeding before an administrative law judge to determine the amount of damages that defendant local exchange carriers owed to certain IPPs for the unlawful assessment of EUCL charges.[221] All of the defendants in the instant proceeding, except Qwest, were a party to that proceeding.[222] Prior to issuing the order referring the damages issue to an Administrative Law judge, the Enforcement Bureau sought proposed hearing designation orders and comments from the parties regarding the procedures for hearing.[223] The complainants in those cases, who were represented by the same counsel who represent the current Complainants, had asserted that because IPPs were found not to be "end users" within the meaning of Section 69.104(a), the collection of EUCL charges for semi-public payphones was unlawful.[224] The Enforcement Bureau rejected those claims as untimely, stating that they should have been raised in a timely filed reconsideration petition to the *Liability Order*.[225] Nevertheless, the Enforcement Bureau clearly described the claims, thereby informing Defendants of their existence.[226] Thus, it is reasonable to assume that Defendants were on notice that these same claims might be raised in a subsequent adjudication of the thousands of pending informal complaints. Finally, all of the Defendants have been aware of the nature of the claims contained in the formal and informal complaints for a number of years because, as we have stated previously, they have had a number of opportunities to engage in settlement discussions with the Complainants, often with the involvement of Commission staff.[227]

80. Accordingly, we conclude both that Defendants have had adequate notice of the allegations that form the basis of the formal complaints and that settlement discussions have occurred. We therefore find that it is appropriate to waive Section 1.721(a)(8) of our rules. This waiver is based on the unique circumstances of these proceedings, in particular, the parties' involvement in adjudicating and mediating the relevant issues over a lengthy period of time, and is not an indication that a complainant in any other proceeding may fail to ensure that a defendant receive adequate notice of the claims being asserted against it.

VIII. CONCLUSION AND ORDERING CLAUSES

81. For the reasons discussed above, we conclude that Defendants' imposition of EUCL charges on the Complainants violated Section 201(b) of the Act and Part 69 of the Commission's

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220 The informal complaints against each Defendant were attached to the certified settlement letters, thereby providing Defendants with a contemporaneous reference to the claims at issue.

221 *HDO*, 16 FCC Rcd 8801.

222 Although Qwest was not party to the *HDO* proceeding, it was a defendant in the informal complaints and therefore had notice of Complainants' arguments. CVCA v. Qwest Complaint, Exh. 1.

223 *See HDO*, 16 FCC Rcd at 8805, ¶ 8.

224 *Id.*

225 *Id.*

226 *Id.* at 8805, n.28.

227 *See* Letter Ruling, File Nos. EB-02-MD-018-030 (June 26, 2002), at n.9 (*citing Summary of Enforcement Bureau's Multi-party Initial Meeting Regarding Procedures for Resolving End User Common Line Informal Complaints*, Public Notice, DA 01-1344 (June 4, 2001)) (listing dates for Bureau-facilitated settlement discussions scheduled in 2001).

rules.

82. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), and 208, that the formal complaints filed by Communications Vending Corporation of Arizona, Inc., IMR Capital Corporation, Indiana Telcom Corporation, Inc., National Telecoin Corporation, Inc., NSC Communications Public Services Corporation, and Payphone Systems ARE PARTIALLY GRANTED.

83. IT IS FURTHER ORDERED that the APCC Petition for Declaratory Ruling filed in 1989 is DISMISSED as moot as a result of the *Liability Order* and this Order.

84. IT IS FURTHER ORDERED that, the February 27, 2002 Letter Ruling is VACATED to the extent it relates to the provision of copies of supporting documentation.

85. IT IS FURTHER ORDERED that the Qwest Petition for Reconsideration, the SBC Application for Review, and the TDS Request for Clarification are DISMISSED as moot.

86. IT IS FURTHER ORDERED that, Communications Vending Corporation of Arizona, Inc., IMR Capital Corporation, Indiana Telcom Corporation, Inc., National Telecoin Corporation, Inc., NSC Communications Public Services Corporation, and Payphone Systems, in accordance with Section 1.722 of the Commission's Rules, 47 C.F.R. § 1.722, MAY FILE supplemental complaints concerning damages after the Bureau's release of a Hearing Designation Order in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Appendix A

1) Communications Vending Corporation of Arizona, Inc. v. Citizens Communications Company f/k/a Citizens Utilities Company and Citizens Telecommunications Company d/b/a Citizens Telecom, Supplement to Formal Complaint, File No. EB-02-MD-018 (filed April 26, 2002) ("CVCA v. Citizens Complaint")

2) Communications Vending Corporation of Arizona, Inc. v. Qwest Corporation f/k/a US West Communications, Inc. and as Successor-in-Interest to Mountain Bell Telephone Company, Supplement to Formal Complaint, File No. EB-02-MD-019 (filed April 26, 2002) ("CVCA v. Qwest Complaint")

3) IMR Capital Corporation v. Verizon New England Inc. f/k/a New England Telephone Company, Supplement to Formal Complaint, File No. EB-02-MD-020 (filed April 26, 2002) ("IMR v. Verizon New England Complaint")

4) Indiana Telcom Corporation, Inc. v. Alltel Corporation, Western Reserve Telephone Company-Alltel, Alltel Ohio, Inc. and Alltel Indiana, Inc., Supplement to Formal Complaint, File No. EB-02-MD-021 (filed April 26, 2002) ("ITC v. Alltel Complaint")

5) Indiana Telcom Corporation, Inc. v. Indiana Bell Telephone Company, Inc. D/B/A Ameritech Indiana and Ohio Bell Telephone Company, Inc. d/b/a Ameritech Ohio, Supplement to Formal Complaint, File No. EB-02-MD-022 (filed April 26, 2002) ("ITC v. Ameritech Complaint")

6) Indiana Telcom Corporation, Inc. v. BellSouth Telecommunications, Inc. f/k/a South Central Bell Telephone Company, Supplement to Formal Complaint, File No. EB-02-MD-023 (filed April 26, 2002) ("ITC v. BellSouth Complaint")

7) Indiana Telcom Corporation, Inc. v. CenturyTel, Inc. and Century Telephone of Central Indiana, Inc. f/k/a Central Indiana Telephone Company, Supplement to Formal Complaint, File No. EB-02-MD-024 (filed April 26, 2002) ("ITC v. Century Complaint")

8) Indiana Telcom Corporation, Inc. v. Telephone and Data Systems, Inc., TDS Telecommunications Corporation, Tipton Telephone Company, Inc. d/b/a TDS Telcom, Communications Corporation of Indiana d/b/a TDS Telcom, and Home Telephone Company of Pittsboro, Inc., Supplement to Formal Complaint, File No. EB-02-MD-025 (filed April 26, 2002) ("ITC v. TDS Complaint")

9) Indiana Telcom Corporation, Inc. v. Verizon North Inc. f/k/a GTE North, Incorporated and as Successor-in-Interest to Contel of Indiana, Inc., Supplement to Formal Complaint, File No. EB-02-MD-026 (filed April 26, 2002) ("ITC v. Verizon North Complaint")

10) National Telecoin Corporation v. Verizon Delaware Inc. f/k/a Bell Atlantic-Delaware, Inc.; Verizon New Jersey, Inc. f/k/a Bell Atlantic-New Jersey, Inc.; and Verizon Pennsylvania Inc. f/k/a Bell Atlantic-Pennsylvania, Inc., Supplement to Formal Complaint, File No. EB-02-MD-027 (filed April 26, 2002) ("NTC v. Verizon Delaware Complaint")

11) NSC Communications Public Services Corporation v. Pacific Bell Telephone Company, Supplement to Formal Complaint, File No. EB-02-MD-028 (filed April 26, 2002) ("NSC v. PacBell Complaint")

12) Payphone Systems v. Citizens Telecommunications Company of California, Inc. f/k/a Citizens Utilities Company of California, Inc., Supplement to Formal Complaint, File No. EB-02-MD-029 (filed April 26, 2002*)* ("Payphone Systems v. Citizens Complaint");

13) Payphone Systems v. Pacific Bell Telephone Company, Supplement to Formal Complaint, File No. EB-02-MD-030 (filed April 26, 2002) ("Payphone Systems v. PacBell Complaint")